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POST-EMPLOYMENT LOBBYING RESTRICTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

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POST-EMPLOYMENT LOBBYING RESTRICTIONS

THURSDAY, JUNE 25, 1987

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met at 9:37 a.m., pursuant to notice, in room 342, Dirksen Senate Office Building, Senator Carl Levin (chairman of the subcommittee) presiding.

Present: Senators Levin and Stevens.

Staff present: Linda J. Gustitus, Staff Director and Chief Counsel; Charlene Simmons, Professional Staff Member; Frankie de Vergie, Chief Clerk; Jeff Carter-Campbell, Intern; Lynn Brown, Intern; and Andrew Pollack, Minority Congressional Fellow.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. This hearing this morning has been called to address the confusion and the multitude of problems surrounding the Office of Government Ethics' statutory authority to compartmentalize executive branch agencies and departments.

Compartmentalization is done to limit the effect of the one-year bar to post-employment lobbying by executive branch officials. Our subcommittee investigation has led me to the conclusion that the application of 18 U.S. Code 207(c) is in a mess and that the manner in which the compartmentalization authority has been exercised is one of the major causes of that mess.

Our purpose here today is to identify the specific problems and to see how we can achieve realistic and understandable solutions. One possible solution is to eliminate compartmentalization altogether. The bill recently reported out of the Judiciary Committee which revises 18 U.S. Code 207 would do just that. While that is an option, I am not certain at this point that that is necessarily the right course for us to take. Today's hearing should enable us to better assess all the alternatives.

18 U.S. Code 207 is the statute which establishes criminal sanctions for certain types of lobbying by certain senior officials in the executive branch. Subsection (c) prohibits any senior official from lobbying his or her own agency for one year after terminating government employment.

The Office of Government Ethics, or OGE, has the authority to limit the application of this one-year no-contact ban by designating parts of departments or agencies as separate compartments. A

senior official in one compartment in one agency can thereby lobby officials in another compartment of the same agency within the otherwise prohibited one-year time period.

According to a previous report by our full committee, compartments are to be created "only in those kinds of exceptional and clear cases where an agency—exercising wholly separate and distinct functions—happens to be contained within a department." Examples would include the Social Security Administration and the Food and Drug Administration in the Department of Health and Human Services.

In allowing exceptions to the one-year lobbying ban, Congress sought to balance the government's need for unbiased decision making and the appearance of unbiased decision making, with the right of former high-ranking officials to contact unrelated components in their former agency.

However, this delicate balance hinges on the OGE's careful administration of its authority to designate compartment. Unfortunately, examination of the record indicates that OGE has failed to exercise this authority in a uniform, timely, consistent, or reasonable manner, and has thereby jeopardized the balance intended by Congress.

The Executive Office of the President, or the EOP, provides a good example of that failure to adequately define and implement reasonable and uniform standards. In January 1981 OGE received a letter from the Carter Administration asserting that the EOP consisted of eight separate agencies for purposes of the one-year lobbying ban and that the EOP didn't need OGE's designation of those compartments to make them a reality.

But the then-director of the OGE, J. Jackson Walter, promptly rejected that assertion and suggested that any future request for compartmentalization of the EOP begin with the premise that the EOP, the Executive Office of the President, is a single agency.

In March of 1983 the acting director of the OGE, David Scott, approved—apparently without any additional substantiating explanation—a request by White House Counsel Fred Fielding to create nine compartments within the EOP. The current OGE, director, David Martin, has concurred in David Scott's approval.

The Executive Office of the President, a relatively small agency with 1,500 total and 136 senior employees, has thereby been divided into nine smaller compartments, limiting the range of the one-year no-contact ban. The compartments include the White House staff, the Office of Management and Budget, the National Security Council, and the Office of the Vice President.

Congress surely intended to prohibit high-ranking officials in the EOP from lobbying their colleagues anywhere in the EOP for a year after leaving office. However, due to the OGE's apparently unsubstantiated and unreasonable compartmentalization, the deputy director of the OMB, for example, is allowed to lobby anyone on the White House staff and, I might add, anyone in any other department or agency immediately upon leaving office.

While we continue to preclude, for example, the deputy director of the Forest Service from lobbying anyone in the Farmers Home Administration or the Food and Nutrition Service of the Depart-

ment of Agriculture because the Department of Agriculture hasn't been compartmentalized. That just doesn't make any sense.

It has been asserted that the compartmentalization of the Executive Office of the President is an important reason why the Independent Counsel in the Deaver case did not bring indictments under 18 U.S.C. 207(c) for the lobbying contacts with EOP officials which are identified in Deaver's indictment for perjury.

In contrast, the Independent Counsel in the case involving Lyn Nofziger has no such impediment. Mr. Nofziger left the White House the year before OGE changed its mind and authorized compartmentalization of the Executive Office.

Although the Executive Office of the President offers the most visible example, compartmentalization throughout the executive branch has been equally haphazard. GAO examined OGE's records and found a lack of documentation substantiating OGE's decisions for setting standards. Compartments approved by the Office of Government Ethics, the OGE, range in size from the five employees of the Central Liquidity Facility out of the 677 employees at the National Credit Union Administration, to the 110,000 employees at the IRS.

Nine departments have been compartmentalized, with the Department of Justice leading the list with 205 compartments. 190 of those compartments are the individual U.S. Attorneys' and U.S. Marshals' offices, in the various judicial districts across the country.

However, the Department of Agriculture, with 105,000 employees in major components such as the Farmers Home Administration, has, as I mentioned, not been compartmentalized. Neither have the Departments of Education, Housing and Urban Development, Interior, nor 54 of the 57 government corporations and independent establishments. At least four compartments, including OGE, contain only one senior official.

OGE has another significant responsibility under the post-employment conflicts-of-interest statute, and that is to designate the positions which are included in the one-year lobbying ban. Only the highest-ranking officials in the executive-level positions and top military positions, 0–9, are automatically covered. Senior executive service and military 0–7 and 0–8 are covered only if their positions have been designated by the Office of Government Ethics and published in the Federal Register. Designation is supposed to follow a finding that a position involves "a significant decision-making or supervisorial responsibility."

Here, too, the OGE's implementation of the statute has been mismanaged. Subcommittee staff has found that publication of the designations is running over a year late, a significant problem since coverage doesn't become effective until six months after publication.

In addition, OGE has effectively delegated decisions over coverage to the agencies themselves and does not conduct a thorough independent review of the proposed or excluded positions. As a result, according to a study done for the subcommittee by the Congressional Research Service, there is wide variation between agencies in the proportion of covered positions. Many high-ranking positions, GS–17 and above, are not covered. The Department of State,

for example, has 834 such positions, of which only 194 have been designated to be covered by the one-year ban.

In contrast, the Office of Personnel Management has 30 positions at GS–17 and above, but it is reported to have 62 designated senior positions for coverage under the law. I don't even know how that could be possible.

In addition, there are important differences between the number of positions published in the Federal Register and the number of positions identified by the agencies themselves.

For example, while the Federal Register reports 82 designated senior positions in the Executive Office of the President, the White House personnel office reports that there are only 62 designated senior employees. What are the 20 employees in the positions in dispute supposed to assume about the application of 18 U.S. Code 207(c) to their activities? That is a criminal provision that we are talking about.

Similar confusion over the statute's coverage exists throughout the executive branch. Disagreements, uncertainty, errors, and mistakes involving the coverage of senior Federal employees by a criminal statute have profound implications for these individuals, who can be charged with a criminal violation.

The current system is too complex to interpret, too cumbersome to administer, and too inadequately implemented. The system is in desperate need of repair, and maybe compartmentalization should be abolished altogether. I am hopeful that this hearing will provide us with the information to act responsibly. The public interest in having a cooling-off period for high-ranking executive branch officials from lobbying former colleagues after leaving the government is a valid interest.

Integrity in government is a goal of overriding importance, and the prohibition of lobbying their former agencies by former high-ranking officials is an important ingredient in achieving that integrity. The prohibition must be part of a fair and understandable system for both the high-ranking official whose activity must be fairly restricted, and for the public who rightfully demands tough enforcement of our laws.

Senator Stevens, did you have an opening statement?

Senator STEVENS. I have no opening statement, Mr. Chairman. Thank you.

Senator LEVIN. Thank you, Senator.

Our first witness today is Stu Eizenstat, who was formerly the assistant to President Carter for Domestic Affairs and Policy and is presently a partner of Powell, Goldstein, Frazer, and Murphy, in Washington, DC.

Mr. Eizenstat, we most appreciate your appearance here today. Your testimony is extremely illuminating, and we will, of course, make it a part of the record. If possible, though, we would like you to summarize at least parts of it so that we will have time for questions.

TESTIMONY OF STUART E. EIZENSTAT, PARTNER IN THE LAW FIRM OF POWELL, GOLDSTEIN, FRAZER & MURPHY (FORMER ASSISTANT TO PRESIDENT CARTER FOR DOMESTIC POLICY) [1]

Mr. EIZENSTAT. Thank you, Mr. Chairman, Senator Stevens. I appreciate the opportunity to appear on an issue which may seem at one level technical, but in fact goes to the very heart of our conflict-of-interest laws, and that is, the compartmentalization of the Executive Office.

I comment on this from the experience of having served twice on the White House staff, once under President Johnson and once under President Carter. In addition, I teach a course each year on the presidency at Harvard. I just completed service on a special task force chaired by Fred Fielding and Lloyd Cutler, who, respectively, were legal counsels to President Reagan and President Carter, which examined this very issue.

I also have a personal interest in the topic because I helped coordinate the Carter Administration's position on the conflict-of-interest laws which led to passage of the 1978 Ethics in Government Act.

Let me state my conclusion at the outset. That is that the Executive Office of the President should be considered one unit for purposes of the conflict-of-interest laws of this country. The current compartmentalization into nine separate components or indeed, as some in the Carter Administration suggested, seven is inappropriate, illogical, and fails to recognize the continuous interaction between various units of the Executive Office of the President.

I refer the committee to pages 3 to 13 of my testimony for the history of the Executive Office of the President, how it began under President Roosevelt, what led to its creation, what the intention was in its creation, as well as the history of the compartmentalization of the Executive Office under the 1978 act.

Rather than repeat that, in the interest of time I would like to go directly to my recommendations.

I must disagree both with the judgment of some in my own administration in 1981 regarding the separate designations, those of the Reagan Administration in 1982, and the Office of Government Ethics agreement in 1983 to designate nine requested subdivisions of the Executive Office as separate statutory subagencies.

I can tell this subcommittee that the nine units interacted, in my experience, on a regular and persistent basis and cannot be in any way considered separate subagencies. Virtually every issue, Mr. Chairman and Senator Stevens, worthy of coming to the Oval Office for the President's decision comes to him because it involves conflict—conflict among and between various of his own Cabinet departments and conflict which cannot be resolved short of the President himself.

By their very nature, presidential issues cut across the jurisdictions of his own Cabinet departments and agencies. Every issue coming to the Oval Office involves the interests of multiple departments and agencies within the executive branch, each with their own turf-driven and constituency-driven viewpoints. Decision

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[1] See p. 57 for Mr. Eizenstat's prepared statement.

making within the executive branch is, therefore, highly balkanized in the absence of White House coordination.

In order to provide the President with a rational decision making process, given the cacophony of different views presented to him by his own executive branch departments, the White House and the Executive Office of the President must serve as an integrator. Yet, the integration of policy at the White House level of the disparate views of the President's own departments will only work effectively if the components of the Executive Office of the President themselves work together regularly and smoothly. These components in no way exercise distinct and separate functions from each other, but necessarily perform complementary functions.

I have provided in my testimony examples of our minimum-wage decision in 1977, of the trade policy decisions which came across my desk and the President's, and of energy and environmental decisions which were decided by the President. In each of those cases and in the myriad of other instances, almost all the units of the Executive Office of the department were involved.

I made certain on every significant domestic issue that the budget aspects were brought to the President's attention, thereby involving OMB; that its economic consequences were considered, thereby assuring participation of the Council of Economic Advisers; that the political and congressional consequences were factored in, thereby involving the White House Office; that the Vice President's staff always had their opportunity for input, thereby involving the Office of the Vice President; and that the other components of the Executive Office were likewise involved as needed on a particular decision—and they frequently were.

Moreover, in my experience, an increasing number of issues have both international and domestic implications. Thus, for example, the President could not make an informed and wise decision on trade policy, on export policy, on microeconomic policy, or on specific issues we faced—like the Iranian hostage crisis or the Afghan invasion—without involving both the foreign and domestic sides of the White House and the Executive Office of the President.

It was essential that the staff of the National Security Council be involved as well as domestic units, such as the Domestic Policy Staff, the Council of Economic Advisers, and OMB, on these issues.

In addition, it is important for this subcommittee to understand the way in which general macroeconomic policy is made by Presidents, Republican or Democratic. The Nixon, Ford, Carter, and Reagan Administrations all created a unit outside the Executive Office, but working closely with it, variously called the "Economic Policy Group," the "Economic Policy Board," or the "Economic Policy Council," depending upon the administration. Each is responsible for long- and short-term macroeconomic decisions for the Presidents they serve, and they are traditionally chaired by the Secretary of the Treasury. The major participants besides the Treasury are OMB, the Council of Economic Advisers, the National Security Council, and the Domestic Policy Staff, now called the Office of Policy Development. And on frequent occasions the United States Trade Representative and the Vice President's office will join in those meetings.

In our administration this group met at least once every week, and that is a pattern that has been followed by the Reagan Administration as well.

The facts are that in every modern presidency these nine agencies designated as separate and distinct in fact work in a close, intimate, and regular contact. Indeed, a presidential adviser who did not regularly bring in the representatives of these units for significant presidential decisions would simply not be doing his job.

There is no question but that any senior official working in one would have a disproportionate impact on those officials remaining in the other components of the Executive Office. In fact, for example, to indicate as the current designations do that the Office of the Vice President and the White House office are somehow distinct and separate is to deny the kind of regular and extensive coordination between the two that in fact has existed—and wisely so—under both the Reagan and Carter Administrations. It is critically important that the two senior officials in the executive branch have a good personal relationship. But it is also critical that in an institutional way the President's staff and the Vice President's staff have a continuous and intimate working relationship with each other.

I normally invited, for example, Vice President Mondale's staff to participate in all intergovernmental and inter-White House meetings, and I believe that the same is true with respect to Mr. Bush.

The fact that particular Executive Office entities may have been created by separate statutes has utterly no relevance to their actual working relationship. To consider these nine components of the Executive Office of the President to be separate subagencies flies in the face of the history of the Executive Office I have provided earlier in my testimony.

Again, it should be emphasized that the original, and indeed continuing, purpose of the Executive Office of the President is to serve as an integrating mechanism for the President to organize policy within the executive branch. In order to perform this function, the Executive Office itself must be integrated and must perform as a cohesive unit, not separate and distinct subagencies.

Issues do not come to the President in neat, compartmentalized vessels but, rather, cut across a number of jurisdictions and disciplines. In order for the President to be best served, he has to understand an issue from a variety of perspectives, oftentimes scientific and technological, macroeconomic, political, domestic, and international.

For these reasons, I urge this subcommittee and the full committee by statute to treat the entire Executive Office as one agency so that for one year no senior-level person within the Executive Office of the President can meet with any employees of any subcomponent within the Executive Office.

I do not wish to involve myself in legal judgments on the Michael Deaver case. But it is impossible to testify in this matter without expressing the opinion that a person at that level would quite obviously have a disproportionate impact on decisions by any unit within the Executive Office of the President, such as OMB, with whose representatives he allegedly met.

Without commenting on the legality of that contact—and I want to emphasize that I am not doing that—suffice it to say that this subcommittee should not permit people similarly situated to do this without it being a violation in the future of the conflict-of-interest laws of this country.

My recommendation with respect to eliminating compartmentalization in the Executive Office is confirmed by the recent decision of the Task Force on Ethics and Government Legislation of the Kennedy School of Government at Harvard, cochaired by Mr. Fielding and Mr. Cutler. That task force, of which I was a member, found as follows, and I quote pertinent parts:

> Our subcommittee has concluded that a bright line should be drawn that precludes EOP employees compensated at a rate equivalent to Executive Level II from contacting for one year any employee of the EOP, stressing the power and influence of the most senior presidential assistants as extending throughout the Executive Office of the President.

Therefore, the majority of that subcommittee felt that Congress should amend the Ethics Act to codify their recommendation.

There is also a question, Mr. Chairman and Senator Stevens, of the sufficiency of the current legal definitions of senior officials in 18 U.S.C. 207(d). As a practical matter, significant decision making and supervisory responsibility rarely extends deep into the ranks of White House officials below the executive-level pay scale. Because of the coziness and intimacy of the White House staff, for appearance sake this subcommittee may wish to consider extending the one-year bar to lower-level White House employees. But frankly, from a purely practical standpoint, it is unlikely that such lower-level employees would in fact have an undue influence on decision making by any component within the Executive Office of the President.

It should be remembered, as you mentioned in your own opening statement, Mr. Chairman, that the post-employment conflict-of-interest laws are designed to balance on the one hand the interests of society in honest government through appearance and reality of an absence of conflict of interest and the avoidance of undue reward for government service, balanced on the other hand with fairness to the former government employees and the interests of government in being able to recruit top-notch people.

I would be glad to take any questions that the Chairman or Senator Stevens has on this topic or on the broader issue of compartmentalization.

Senator LEVIN. Thank you very much, Mr. Eizenstat.

You are indeed correct that this morning's hearing has to do with compartmentalization in general. We will be talking about some specifics, but there will be great care taken not only, hopefully, by our witnesses as you have taken the care, but by everybody on the subcommittee not to make any comment relative to a pending case. That is not the purpose of today's hearing.

Under the current compartmentalization of the Executive Office, there is no recognition that any one office has supervisory authority over another office. Now, that chart up there has five of the nine compartments, but it is basically symptomatic of the situation in the Executive Office. The office is divided into nine pieces, nine

compartments, and there is no one office which is shown as having any supervisory authority over any other compartment or office.

I am wondering whether or not that is an artificial premise?

Mr. EIZENSTAT. It depends strictly on the administration. For example, in our administration, for the first year and a half—and this was a serious mistake—there was no formal, designated chief-of-staff; therefore, one could literally say that no one person or office had supervisory authority over anyone else. No one was under anyone else.

We were organized on the so-called "spokes of the wheel" theory, which President Kennedy used; namely, that each of the senior White House officials with specific responsibilities, like National Security Adviser, Domestic Adviser, Political Adviser, and so forth, had equal access to the President.

In the latter half of administration, there was a formal, designated supervisory authority in the chief-of-staff's office.

If I may take the Reagan Administration as a partial contrast to show you the complexity of the question, clearly there was a very strong and very able chief-of-staff in Jim Baker in the first administration and a very strong chief-of-staff in the second half of the administration in Mr. Regan.

However, my understanding is that neither exercised very direct supervisory authority over the national security apparatus during parts of the administration and yet during others they did. For example, Mr. Regan has indicated that, with respect to the Iran matter, he had no supervisory authority and was not aware of that. During other parts of the administration there was greater oversight.

But this is always a tense issue, and even, frankly, when we had a chief-of-staff in the latter half of our administration, to say that they had supervisory authority over Dr. Brzezinski and his staff would be a gross overstatement. So it really depends on the particular administration, the way in which the President has set the office up, and the particular nature of the individuals involved.

Senator LEVIN. I would like to ask you about your testimony at the bottom of page 23. This relates to the extent of the influence of senior White House officials over top-level appointees throughout the government.

Now, currently, the law does not apply any ban on an interagency basis. You say in your statement that such a ban is unnecessary.

I am wondering whether or not such a ban shouldn't apply at least to the highest-ranking White House officials. And let me give you the example. This is a totally theoretical example, but let me use names we are familiar with.

Let's assume that the former chief-of-staff Don Regan were to lobby, let's say, Secretary Dole or any other Cabinet officer. Wouldn't that have the same appearance problem as if he lobbied Howard Baker, who is the current chief-of-staff and who Regan is not able to lobby under the one-year ban? Isn't this problem the same in terms of public confidence?

Mr. EIZENSTAT. Frankly, given Mr. Regan's situation, it might have a counterproductive effect if he did that. But the broader question——

Senator LEVIN. Putting aside personalities.

Mr. EIZENSTAT. The broader question you ask is a legitimate one. This is a very tough question in terms of balance. The answer to your question is "Yes," that a person at the very senior levels, the heads of these component units, would undoubtedly have a disproportionate and undue influence on practically any area in the government.

I would not, however, want to go much beyond the very top-level people. I think once you get the deputies and second- and third-level people, they would not.

The question that I had been asked in the letter inviting me to testify was whether, by virtue of the appointments process, that is the case. And I mentioned that really only a very small number of people in the White House are responsible for appointments, usually only the personnel office and the chief-of-staff's office, and to say that the National Security Adviser or the Domestic Adviser or the chairman of the Council of Economic Advisers or the director of OMB, because of the appointments process, would have a disproportionate impact would be untrue.

But I have no objection, Mr. Chairman, to saying that someone who heads each of the nine component units or, indeed, any of the units within the Executive Office would in fact have a disproportionate influence and could well come within the one-year bar.

Senator LEVIN. Would you extend that one-year ban beyond the top levels of the EOP? Would you also ban any other top-level people in any other agency from coming back and lobbying during that one-year period the heads of other agencies?

Mr. EIZENSTAT. The heads of other agencies?

Senator LEVIN. Yes.

Mr. EIZENSTAT. Well, one could conceive of a situation in which the Cabinet Secretaries themselves might be precluded from lobbying other agencies. But I frankly think certainly below that that is not necessary, even for deputies and undersecretaries.

And I really question, frankly, doing it with Cabinet Secretaries. That is because there is so much internal jealousy and conflict among and between departments of the executive branch, which is precisely why you need the Executive Office and the White House to coordinate policy, that to say that the Secretary of Defense could go in to the State Department and really have an undue influence, obviously he would be given more of an audience than someone else, but I am not sure I would suggest that he would have an undue influence.

In any event, one really gets to a point where you have to start making this delicate balance. To what extent are you really saying to people, "You go into government service, and then leave Washington for a year and take a vacation if you want to stay here"? I really am concerned when one begins to extend this principle so far that we send an even stronger message than we are already sending, that your government service comes at a very severe price. People give up enough to come into government. They sacrifice enough, I hardly need tell both of you Senators, to be in it, one has to be very careful about limiting what they can do afterward to such a degree that it would discourage people from coming to government.

Senator LEVIN. A bill has passed the Judiciary Committee, Senate bill S. 237, which Senators Metzenbaum and Thurmond have cosponsored, which would have a one-year ban apply to high-ranking officials throughout the government, not just to their agency, not just to their branch, but throughout the government. For instance, if a Federal judge retired, that judge covered under that bill could not have any contact with anybody, could not lobby, for instance, or have any other prohibited contact with anybody in the Federal Government in any branch. He couldn't even lobby the executive branch or the legislative branch.

It has some far-reaching implications, way beyond what you have just described, and if you are not familiar with that bill, to ask you to do something further for this subcommittee, we would appreciate your taking a look at that and giving us comments perhaps for the record on S. 237.

Mr. EIZENSTAT. I will be glad to. But with respect to that particular provision, I would be very strongly against that. Again, there is just a degree to which one can take our justifiable passion for morality to a point where it is counterproductive. I think that is very much at that point in that bill.

Senator LEVIN. Mr. Eizenstat, can you tell us what you and others in the Carter White House were told about post-employment lobbying bans when you left office? What was the information provided to you?

Mr. EIZENSTAT. We had several months to think about that issue. Lloyd Cutler coordinated our policy. I frankly have no immediate recollection of being directly involved in the designation of the seven that was made at the end of January of 1981, just before we left office.

Senator LEVIN. My question was a more general one, though.

Mr. EIZENSTAT. Yes.

Senator LEVIN. What were the folks told?

Mr. EIZENSTAT. I do remember very clearly a conversation with Lloyd Cutler, who has a great deal of wisdom in many areas, including this one. I remember him saying to me very clearly that quite apart from how this issue of the designations came out, that he thought it would be ill-advised for any of us at a senior level, and certainly for me, to have any contact with any component of the Executive Office of the President—such as OMB. I remember him saying—for that one-year period, just for appearance's sake, quite apart from the issue of whether it was or was not legal, no such contacts should be made. It just did not wash to make them.

Now, you know, you have an interesting situation here.

Senator LEVIN. My question, though, was a little bit more general, if I could interrupt for a second because I am going to turn this over to Senator Stevens in a moment. My question was what was the general information provided to senior officials about the coverage of 18 U.S.C.? Were you given a brochure as to what you could or couldn't do?

Mr. EIZENSTAT. I have no recollection of being given a brochure. What I am indicating is that my information came from this discussion with Lloyd. It is possible and perhaps probable that we were given some document. I don't doubt that we were. It's not something of which I have any immediate recollection.

But again, what I recollect is his very strong admonition, which was, "Just stay away for one year."

Again, it raises the question that when you talk about undue influence, one may have undue influence if he leaves his administration while the administration is still in office. But one has to question whether one has undue influence over the next administration, particularly of another party. Obviously, you can't draw a statute that makes those kinds of distinctions, so I very much support having a blanket bar.

Again, the bottom line is that my recollection of the information I got was from the conversation with Lloyd Cutler. I may have been given some documentation, but I have no immediate recollection of it.

Senator LEVIN. Thank you. I misspoke. The bill I referred to, the Thurmond-Metzenbaum bill, has an eighteen-month ban across government for senior officials. It is not twelve.

Mr. EIZENSTAT. If you want to get into the broader compartmentalization of the rest of the government at a later point or during this testimony, I am prepared to talk about that as well.

Senator LEVIN. Thank you. Thank you very much.

Senator Stevens.

Senator STEVENS. I find this very interesting because I was in the executive branch, too, and I remember that at the time we self-imposed a one-year ban on everyone.

I am startled a little bit at your comment that you believe it is influence rather than access. Aren't we really talking about access? You can remember, I am sure, being in an office and having someone say, "Good morning, Judge," "Good morning, Mr. Secretary. How are you, Mr. Eizenstat?"

I mean, the access question, how do you get into these agencies, ought to reflect, I think, the expertise that comes from the privilege of having served in the government. Would you disagree with that?

Mr. EIZENSTAT. No. No, I think it's a question of both access and influence. But I suppose, with respect to the issue of access, that is an influence which extends well beyond one year after you leave. I mean, it's almost a sort of permanent sinecure that comes with high office.

I think the question of whether one exercises undue influence, particularly within the Executive Office, is quite another story. And I do think that any of the senior-level people, Senator Stevens, within the Executive Office of the President will not only have access to their former colleagues but will have the potential for undue influence because they will have worked with them.

Senator STEVENS. Well, I have watched now for some twenty years this time, and previous to that back to the Truman Administration, and it seems to me as we have changed, it makes no difference what the party is of the administration, that the people who have held high office have that access as a matter of fact.

Mr. EIZENSTAT. I agree with that.

Senator STEVENS. The question is whether we ought to do something to establish a line which would assist in making the whole apparatus fair to those who haven't had that privilege. Would you agree with that?

Mr. EIZENSTAT. Yes, sir.

Senator STEVENS. Now, if that is so, why should we have this Office of Government Ethics involved in determining what the impact of organizational structure within any agency of the government is as far as criminal law is concerned? I never could understand why we did that. It means that a criminal case rests upon a finding of fact of another executive agent as to what in fact the particular person that might be accused of undue influence, what that person's relationship was to the whole spectrum of government. That makes it very difficult, as a former prosecutor, for me to contemplate you would ever get a conviction on those cases.

Mr. EIZENSTAT. I agree wholeheartedly with you. I have given a great deal of thought to this issue of the broader question of OGE's role in the compartmentalization, and I think I come out where you are suggesting.

If I may elaborate on that, because the Office of Government Ethics—to even compound the problem further—will only designate separate compartments or subagencies at the request of the departments or agencies—they won't even self-initiate it—we now have an absolutely crazy-quilt situation because some agencies have requested the designations and others have not.

Therefore, you have not only from a prosecutorial sense but also in terms of the fairness to former employees, a real inequity for those from agencies that requested the designation as opposed to those that did not.

For example, the Departments of Agriculture, Education, HUD, and Interior, are considered single agencies, no compartments, simply because they have never asked for a designation. Therefore you couldn't contact anyone within that department on a particular matter for a year.

To compound this ridiculous situation, the National Credit Union Administration, which is a tiny agency, has one of its subcomponents, its Central Liquidating Facility, as pointed out in the GAO report, with four employees designated as a separate agency.

OGE doesn't document its decisions well, as the chairman mentioned in his opening statement. The criteria are very uncertain.

You had a situation where our seven designations were overturned by the Office of Government Ethics on the ground that in fact the Executive Office was one agency, and then the Reagan people came along and added two additional designations to our seven, and OGE accepted all nine after having said the seven weren't adequate.

Now, how does one really deal, therefore, with the situation? I think the only way to deal with it—I am not a great believer in bright-line tests, generally, but I think it is about the only way to deal with it—I think we should just have no compartmentalization. We ought to make it easier for prosecutors and we ought to make it easier for the former employees and simply say that if you are a top person at the Department of Army, you don't talk to the person from the Department of Navy even though you may not have an undue influence.

We simply cannot make these finite distinctions: in some agencies you may, in some agencies you may not; it depends on whether an agency asks for the designation. There are too many varieties of

circumstances, too many vagaries for prosecution and for an honest employee to know what to do.

So if that is the thrust of your suggestion, I very much agree with you.

Senator STEVENS. Well, I have to tell you, based on my own experience, I would rather have certainty, and I think we ought to have a government-wide rule.

I remember so well when I was an assistant to a Cabinet officer, the many meetings I went to in other Cabinet officers' offices, and the messages that I took from one Cabinet officer to another Cabinet officer or to the staff of another Cabinet officer, the access was apparent.

I just finished having a conversation this last week with a former member of the Joint Chiefs of Staff, and I was told that the members of the Joint Chiefs of Staff really aren't involved in making decisions on procurement. I don't think the public believes that.

It seems to me that we have to have—therefore, they wouldn't be banned, by the way, in terms of being involved in lobbying or contacts on procurement. I think we ought to have a fairness curtain, one year, I don't care whether you're a typist or you're the President, you should not have anything to do with the Federal Government if you served in the Federal Government.

Mr. EIZENSTAT. You mean even below the senior level? I mean, even with respect to the senior level, if it's outside your own compartment, I really question whether there is going to be undue influence. I understand where you're coming from, and I very much respect the fact that you want to have a bright-line test. I would like to have a bright-line test within one's own department.

Senator STEVENS. What about our staffs? I mean, let's get very—I am going to wind this up because I know you are busy and I don't mean to belabor it. But I do think we ought to lay it out. We have staff members who work with us for years, who have come to have very much expertise in particular subjects, but they contact the whole realm of government.

One Senator that I know, when he left here, automatically imposed on himself a one-year prohibition. He didn't even talk to his colleagues for a year.

Now, our people leave and go downtown or go to New York or San Francisco, and they're involved and they can lobby immediately. I have never thought that was fair in terms of those who hadn't had the exposure and experience of our assistants. After the initial real personal relationship dies down a year, I think then it is a question of experience and know-how.

Mr. EIZENSTAT. I agree with you, Senator, up to a point. First, I very much believe, and our task force, the Fielding-Cutler task force, felt quite strongly that there should be an extension of the one-year bar to the Hill. I think that that should apply.

The question of what a former Senator, Congressman, or top staff person, to what that one-year bar should extend, again my preference would be that it would be within the Congress, but that it not necessarily be extended for lobbying the executive branch. Certainly, within the Congress and certainly extending it to former Members and to their staffs, I wholeheartedly agree.

Senator STEVENS. All right.

I don't want to belabor it, Mr. Chairman. I am going to have to go to another meeting.

But I think it's important for us to eliminate the inequities in this statute and to make it simple so that everyone will understand it. You don't have to hand out a brochure when someone leaves government. It ought to be clearly understood, and this law needs revision.

Thank you.

Senator LEVIN. I think the point is a critical one. My understanding is that there is now a one-year bar on Senators and their staffs in our rule. I surely would support that.

The real question, I think, raised by this other bill that came out of the Judiciary Committee is whether that ban ought to be extended, for instance, to the executive branch. Whether or not a retired Member of Congress ought to be able to have a contact with some executive branch agency, that is kind of the issue that we face.

Mr. EIZENSTAT. I understand.

Senator LEVIN. Now my understanding is that the Office of Government Ethics can compartmentalize agencies even without their requesting it.

Mr. EIZENSTAT. Yes. But as a practice, they do not.

Senator LEVIN. By practice they do not. One of the questions we are going to get into with them this morning is—why don't you do what you can do?

Now, I happen to agree also with you, Senator Stevens. I think this is so complicated, it is so frustrating and, I think, so difficult in terms of management and potential prosecution and comprehension that we ought to have a simple, clear line specifying what you can do if you are above a certain line in your position, and that's it.

Mr. EIZENSTAT. I agree.

Senator LEVIN. I probably, from what I have seen, am ready to drop all the compartmentalization. It has just been totally impractical. It has been flubbed by the OGE. We could have a single line, and if you're above it, you can't lobby. Then the question is: Where? Should it be in your agency, in your branch, or in the entire government?

I think that it is a very open question as to whether or not, for instance, somebody in the executive branch who retires should not be able for one year to contact the legislative branch. That seems to me to be the very open question that we face, and vice versa: whether a retired Member of Congress ought to be able to lobby an executive branch person.

But in terms of this compartmentalization and in terms of clarity and designation of who can, who is covered and who isn't covered, I just would totally agree with your desire that we end this absolute chaos that we have got out there, which I think is very misleading and deceptive and unfair, and which the public also has no confidence in, and rightfully so, and we should come up with a simpler system.

Mr. EIZENSTAT. Well, again, the unfairness in the executive branch is at two levels: one, the unfairness that some agencies have asked for a designation and others haven't. Then, within those departments that have asked for designations, just taking a

glance at the Department of Commerce which asked for a designation, you look at the agencies or subagencies within Commerce which are separate—EDA, Trademark, NOAA, Bureau of the Census. Now, how about ITA, the International Trade Administration? Why not the International Trade Administration? There is no logic to this.

So that I certainly feel that within both the Executive Office of the President and within departments, the whole compartmentalization ought to be thrown out.

The question you raise, Senator, of going beyond that and saying that no senior-level employee should be able to contact anyone else in any department is quite another story. I would like further time to reflect on that. My inclination is to say that I am concerned that that would deter too many people coming into government, and that while you are right that that person would have more access, I question whether it is the kind of undue influence which this criminal statute is concerned about.

Certainly, within his department I would bar him completely from seeing any subcomponent.

Senator STEVENS. Thank you for your time, Stu.

Mr. EIZENSTAT. Yes, sir.

Senator LEVIN. I will be putting this in the record now.[1]

Senator STEVENS. I read that.

Senator LEVIN. Did you?

Just to show how complicated this is.

Senator STEVENS. At first I thought they had lost their minds, but then I understood it. [Laughter.]

Senator LEVIN. This could almost be right out of Dickens. This is a chart of questions you have to ask yourself when you leave the government as to whether you are covered or not. First of all, if you are a designated person, you've got to ask a question, and if the answer is "Yes," then you've got to ask another question. If the answer is "Yes," you've got to ask another question. I mean, that is a Rubik's Cube, and it is not solvable by an awful lot of people.

We will make this part of the record.[1]

Senator LEVIN. Thank you, Senator Stevens.

Let me ask you just one more question relative to White House passes.

Mr. EIZENSTAT. White House passes?

Senator LEVIN. White House passes, yes.

Mr. EIZENSTAT. White House passes.

Senator LEVIN. We have talked about access, and there has been some information in the press about the policy of allowing former White House personnel to retain White House passes. What was the Carter policy? Do you remember the Carter policy about former White House personnel who had passes retaining those passes?

Mr. EIZENSTAT. When you left, you lost your pass. And that is the way it should be. There is absolutely no reason why a person who leaves the White House should keep his or her pass. It is exactly that which leads to the appearance of impropriety even if there

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[1] See p. 118.

may not be any, and which undercuts the spirit of the conflict-of-interest laws.

So that was our policy, and it should be the policy of every administration.

Senator LEVIN. One last question on your bright red line. I agree with both it and the source that you quote relative to it, and with what Senator Stevens said. There are an awful lot of influential people on the White House staff, such as special assistants to the President, that currently fall below that one-year ban. There are a couple of obvious names in the news, one being Oliver North, but he is being covered in another hearing. So let me talk about a man named David Fisher.

Mr. Fisher, who has been referred to in the press as President Reagan's right-hand man, his door-opener—that is the way he has been referred in the press—apparently continued to use that White House pass for a year after leaving office.

Now, the pass question you have already answered. But according to the press reports, he was paid something like $20,000 a month by Carl Channel, who arranged meetings with Channel's contributors with the President. Now, Mr. Fisher had not been employed in an executive-level position.

Should the lobbying ban for White House employees be more expansive than it is in order to include individuals such as Mr. Fisher?

Mr. EIZENSTAT. He is below executive level II?

Senator LEVIN. Yes.

Mr. EIZENSTAT. Well, as I mentioned in my testimony, by and large, people below executive level II in the White House don't have very much influence either within the White House or among their colleagues.

You are citing an instance in which that may not be the case, and as I mentioned also in my testimony, because of the intimacy and coziness of the White House—it is, after all, a very small agency—for appearance's sake you may wish, even if there is no undue influence, just the appearance, and you have cited a good example of that, you may wish to extend the ban to people below executive level II.

But I think in most cases you wouldn't find there was an undue influence. I certainly would have no objection to extending it. From an appearance standpoint and since we are talking this morning about bright red lines and ease of administration, it might make sense to do that.

Senator LEVIN. Mr. Eizenstat, we thank you very much for your helpful testimony, and your answers. If you have any additional thoughts, feel free to let us know and we will make them part of the record.

Our next witness is Rosslyn Kleeman, who is the Senior Associate Director of the U.S. General Accounting Office, the GAO, and she is accompanied by Lynn Gibson, who is an Attorney Advisor on Personnel Law Matters in that Division of the GAO, and by Curtis Copeland, who is an Evaluator with the General Government Division of the GAO.

Ms. Kleeman, thank you very much for being here this morning. Your testimony will also be made part of the record,[1] and we would appreciate your summarizing it.

TESTIMONY OF ROSSLYN KLEEMAN, SENIOR ASSOCIATE DIRECTOR, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY LYNN GIBSON, ATTORNEY ADVISOR ON PERSONNEL LAW MATTERS, AND CURTIS COPELAND, EVALUATOR, GENERAL GOVERNMENT DIVISION

Ms. KLEEMAN. Thank you.

I will summarize my testimony briefly, and discuss some of the Federal agency compartmentalization and senior employee designations that are made under the Ethics in Government Act.

First, our description of compartmentalization. It's the process by which agencies are divided into sub-units for the application of the one-year, no contact restriction in Federal conflict of interest laws.

As you have discussed, the Ethics in Government Act and its 1979 amendment allowed the Director of the Office of Government Ethics to designate statutory and non-statutory sub-agencies or bureaus as separate components and certain senior level positions—or certain positions as senior level positions subject to the no-contact restriction.

You also asked us to comment on the different ways in which the no-contact restriction is applied in the compartmentalization of statutory and non-statutory agencies. This is what you have depicted in your chart, and I agree, it's totally complicated.

In statutory subagencies, former heads of the components are prohibited from contacting the parent agency for one year and, in non-statutory components, former heads who have been designated as senior employees by the Director of OGE may contact the parent department or agency.

OGE officials told us that this difference in the coverage of statutory and non-statutory designations results from an anomaly in the wording of the two statutory provisions authorizing the designations.

They told us that they did notify Congressional staff of the difference in the coverage of the provisions, but that no action was taken.

You also asked about the accuracy and timeliness of the senior employee designation process.

In April of 1984 we reported that the Ethics in Government Act provided no criteria to determine which positions should be considered senior level, but that OGE had established their own designation criteria.

Although the discretion that OGE and the agencies exercise in the designation process may have resulted in some inconsistencies, we have concluded that more precise Government-wide criteria would be difficult to develop because of the variety of agency missions, structures and traditions.

The designation process, however, can break down. For example, in a review we conducted last year of a former Deputy Assistant

[1] See p. 81. for Ms. Kleeman's prepared statement.

Secretary of Commerce's compliance with the ethics laws, we found that his position had been dropped from the OGE list of senior employee positions. Commerce officials described this as an "Administrative error" on their part. As a result, the official was not covered by the one year no contact restriction.

A recent report on compartmentalization analyzed OGE's administration of the no-contact restriction. In brief, we found that OGE relied on the agencies to request designation of components. This has resulted, as has been mentioned, in some large agencies not being compartmentalized while some small agencies have units designated as separate subagencies.

We also found that while OGE officials said their review of agency requests for compartmentalization depends on the sufficiency of the supporting materials, OGE records indicate the process is largely undocumented. None of the files indicated the basis on which the designations were approved.

We also found that OGE published inaccurate lists of designations in the Federal Register. This indicated that either the required reviews and updating of the agency designations were not being properly conducted by either the agencies or OGE, or that OGE was not fulfilling its responsibility to publish these designations accurately.

Our report also described the process by which the Executive Office of the President was compartmentalized into nine separate entities. This has been discussed, but I might just briefly tell you what the process was that we found.

It began in January 1981 when an Assistant to the President in the Carter Administration notified the OGE Director that the Administration believed that OGE's subagency designations for EOP would be unnecessary. He said they were already akin to independent agencies.

Later that year in March 1981, the Director of OGE notified the White House Chief of Staff in the Reagan Administration of his conclusion that the Executive Office of the President was one umbrella agency rather than a group of separate agencies.

At that time the Office of Government Ethics invited the Chief of Staff to request statutory compartmentalization, and in December 1982 the Counsel to the President did request that OGE designate nine entities of the Executive Office of the President as separate and distinct units for the purposes of the one-year no-contact restriction.

This request was based on criteria similar to that which the White House had presented OGE in 1981 when arguing that the Executive Office of the President components were already separate agencies. The Counsel also enclosed descriptions of each of the units within the Executive Office of the President with his request.

In March 1983 the Office of Government Ethics notified the Counsel to the President that the nine requested subdivisions met the requirements for designation as statutory subagencies. The Office of Government Ethics offered no explanation for its decision.

In the absence of any explanatory analysis by OGE, we have concluded that the descriptions provided for some of the nine entities within Executive Office of the President did not themselves appear

to have established conclusively that the EOP units exercised functions distinct and separate from one another.

For example, the Counsel to the President described the Office of Administration as being authorized, and this is a quote:

> To provide administrative support services to all units within the Executive Office of the President, except those services which are in direct support of the President.

This description did not indicate how the Office of Administration can be functionally distinct and separate from all units within the Executive Office of the President while providing support services to those units.

Another example, the Counsel to the President's description of the National Security Council did not explain how that body is separate from the Office of the Vice President, since the Vice President is described as being a member of the National Security Council.

At the time our report was issued in February of 1987, OGE was re-examining the designation. This was because of public concerns raised as a result of former Assistant to the President Michael Deaver's contacts with the Director of the Office of Management and Budget within one year of leaving the White House.

OGE subsequently concluded that the Executive Office of the President designations were proper based solely on the descriptions of functions found in organic legislation for each of the components.

However, the statutes authorizing certain EOP components such as the White House Office and the Office of the Vice President simply authorized the appointment of employees and don't describe the functions or responsibilities.

Also, OGE pointed out in its 1981 letter to the Counsel to the President that the functions and responsibilities of the Executive Office of the President units do not remain static but change from time to time.

We understand that the Director of the Office of Government Ethics is responsible for determining whether components of an agency exercise distinct and separate functions. Nevertheless, we question whether a true determination of the separability of functions exercised by the Executive Office of the President components can be made solely on the basis of underlying statutory authorities.

I believe that summarizes the main points of my prepared statement, and we would be glad to answer any questions you have.

Senator LEVIN. Thank you very much, Ms. Kleeman.

In your report you state that OGE officials told you that their reviews of agency requests for compartmentalization depended on the sufficiency of the support materials provided by the agency.

Now I think you have commented already on this, but just so the record is very clear, what supporting materials did your auditors find?

Ms. KLEEMAN. We found very little. We found some letters requesting compartmentalization and we found some letters designating compartments, but we found very little further support.

Mr. Copeland did the audit and he might have something else to add.

Senator LEVIN. Well, the bottom line question is whether or not the GAO found sufficient support material?

Ms. KLEEMAN. No, I would say not.

Mr. COPELAND. That's correct. Some of the files were absent, some of the files contained only the application for compartmentalization and some contained only the letter granting the compartmentalization. But even in the cases where both the application and the granting letter were present, there was really no indication of the nature of the review process that OGE undertook.

Senator LEVIN. In your opinion, were the materials that you saw there sufficient for the Office of Government Ethics to have carefully evaluated requests for compartmentalization?

Mr. COPELAND. They simply did not indicate the basis on which they made their ultimate decision.

Senator LEVIN. On the question of the authority of the Office of Government Ethics to establish these compartments, does the Office of Government Ethics have the authority, Ms. Kleeman, to establish compartments for each Federal agency on its own initiative?

Ms. KLEEMAN. Yes, they do, but they have chosen to have the agency request it.

Senator LEVIN. And did they choose to do that in some kind of a formal way? Did they notify all the agencies that this won't happen unless you contact us?

Ms. KLEEMAN. I don't believe so, but perhaps the head of the Office of Government Ethics will know.

Senator LEVIN. Okay. But have you seen——

Ms. KLEEMAN. I have no evidence of it.

Senator LEVIN. You just don't know that. Well, we will ask OGE that.

Do they have authority to refuse a request for compartmentalization?

Ms. KLEEMAN. I believe they do if there isn't sufficient evidence.

Senator LEVIN. They are the determiner?

Ms. KLEEMAN. Yes.

Senator LEVIN. And not the agency.

Ms. KLEEMAN. No.

Senator LEVIN. There is no doubt in your mind that under the law it's the Office of Government Ethics which either does or doesn't do compartmentilize.

Ms. KLEEMAN. Yes, sir. I believe they have turned down some requests for compartmentalization, but I don't know how many or what the reason was.

Senator LEVIN. Do any of you know of any turned down requests?

Mr. COPELAND. There have been some. I believe most of those they turned down were ultimately compartmentalized under subsequent request.

Senator LEVIN. In the same way as the original request or in a different way?

Mr. COPELAND. I'm not sure.

Senator LEVIN. All right.

What about rescinding a compartmentalization, do we know of any examples of rescinding compartmentalization?

Ms. KLEEMAN. I don't believe so.

Senator LEVIN. Do you know whether rescission is permissible?

Mr. COPELAND. Agencies can notify OGE that compartments no longer exist and that they can therefore be uncompartmentalized.

Senator LEVIN. Would the OGE have to act to rescind compartmentalization even if the compartments no longer exist?

Mr. COPELAND. I think in order to remove them from the listing of the compartmentalized agencies, yes, they would.

Senator LEVIN. And we do know whether they have ever rescinded a compartmentalization?

Mr. COPELAND. Yes, because there have been some updates of the listings.

Ms. KLEEMAN. We have also found in the Federal Register listing that there are some agencies listed or sub-units listed that no longer exist.

Senator LEVIN. You say you find that they are still listed where the basis for them no longer exists?

Ms. KLEEMAN. The unit is out of existence, but some of these records have not been carefully designated or not carefully reviewed before they were published in the Federal Register.

Senator LEVIN. Are you saying then that there continues to be designated compartments although the basis for it has been removed legally?

Ms. KLEEMAN. Yes, the units have been legally removed, and are listed in the published Federal Register account.

Senator LEVIN. Do you have an example of that?

Mr. COPELAND. Yes. Several examples are on pages 11 and 12 of our report. The Department of Commerce's Bureau of Industrial Economics was first designated on November 14, 1980. It was abolished effectively January 22, 1984. The July 31, 1986 listing still contained that listing although the agency no longer existed.

Senator LEVIN. Has this been pointed out to the OGE, do you know?

Mr. COPELAND. Yes.

Senator LEVIN. And what was their response to you when you pointed that out?

Mr. COPELAND. They were unaware that the errors existed and they said that they would correct them in the 1987 listing.

Senator LEVIN. Now you have reviewed, as I understand it, Ms. Kleeman, the compartmentalization of the Executive Office of the President and have concluded specifically that the descriptions of the nine components provided in Mr. Fielding's letter do not establish separate and distinct functions.

Ms. KLEEMAN. Right.

Senator LEVIN. In your opinion, does the EOP compartmentalization violate the standards set forth in the statute?

Ms. KLEEMAN. I'll let my lawyer answer that. We haven't come to any conclusions on any of this.

Ms. GIBSON. I think that the statute does vest the OGE Director with discretion to make the determination. So that determination is ultimately his responsibility.

However, we have not yet seen a plausible explanation for the compartmentalization of the Executive Office.

As Roz mentioned before, in the 1983 determination made by OGE there was no explanation whatsoever. Subsequently, OGE state only that they reviewed underlying statutory authorities for each of the units and determined that the functions were separable on that basis, and we do not find that to be an acceptable explanation.

Senator LEVIN. Mr. Martin in his February letter to me stated that "he felt constrained"—and I'm now quoting the letter—"by the principles which OGE has applied to all other Executive Branch agencies from making a different determination about the EOP compartment."

Did your review uncover any of these principles?

Ms. KLEEMAN. We couldn't find how the determinations were made.

Mr. COPELAND. OGE officials told us that the nature of their review depended on the substantiating materials that were provided in the request. But since we didn't find any substantiating materials, it was difficult.

Senator LEVIN. I believe you have seen this chart.

Ms. KLEEMAN. I have, yes.

Senator LEVIN. How would you characterize this situation?

Ms. KLEEMAN. I have been working in this area for quite a while now, and it's still confusing to me and totally complicated. I really feel sorry for people who leave the Government who have to make the determination of whether they are covered or not covered and by what.

Senator LEVIN. And I'm wondering whether Mr. Copeland and Ms. Gibson would agree with that?

Mr. COPELAND. That's correct.

Ms. GIBSON. I agree with that. It's taken me a long time studying that chart to fully understand it.

Senator LEVIN. You being the lawyer, Ms. Gibson, would you say whether or not that might create some difficulties for prosecution?

Ms. GIBSON. Definitely so.

Ms. KLEEMAN. I wouldn't want to be the counselor who had to advise somebody leaving the government because, even within the chart, and it's very well done, there are still some questions that are raised in my mind.

Senator LEVIN. Well, we did the best we could. [Laughter.]

It raised some questions in our mind, too, let me tell you. We are not sure that this chart yet—with all the work that went into it—is perfect, and I have some trouble following it.

But let me try to go through a bit of this with you, just a couple of examples.

The chart shows that if a senior official is the head of a statutory compartment, he or she is barred from lobbying the entire agency.

So according to the chart on both sides if a senior official is the head of a statutory compartment, he or she is barred from lobbying the entire agency. Is that your understanding of the current situation?

Ms. KLEEMAN. Yes, it is.

Senator LEVIN. Is the head barred from lobbying other statutory compartments in the parent agency as well?

Ms. KLEEMAN. Yes.

Senator LEVIN. That's your understanding of the current law?

Ms. KLEEMAN. Yes.

Senator LEVIN. Not just according to the chart, but——

Ms. KLEEMAN. No, that's my understanding.

Senator LEVIN. All right. So that the senior official, if he or she is the head of the statutory compartment, is barred from lobbying the present agency and is also barred from lobbying any other statutory compartment in the parent agency?

Ms. KLEEMAN. Yes, sir.

Senator LEVIN. We thank all of you for your attention to this matter, for your testimony and we are most appreciative.

Ms. KLEEMAN. Thank you very much.

Senator LEVIN. There may be additional questions for the record and, if so, we'll keep the record open for three days so that you can answer them.

Ms. KLEEMAN. All right.

Senator LEVIN. Our next witness is David Martin who is the Director of the Office of Government Ethics.

Mr. Martin, we welcome you back to a familiar territory.

TESTIMONY OF DAVID H. MARTIN, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY GARY DAVIS, CHIEF COUNSEL

Mr. MARTIN. Thank you, Mr. Chairman.

Senator LEVIN. We would appreciate of course, Mr. Martin, your summarizing your testimony. The entire testimony will be made part of the record.[1]

Mr. MARTIN. Thank you, Mr. Chairman. I certainly will. I'll be very quick in my summary of my testimony.

I'll try to respond to the questions you sent to us in requesting our presence here.

You know Mr. Davis of course who is our Chief Counsel and has been with me before.

Senator LEVIN. Mr. Davis, you're welcome.

Mr. DAVIS. Thank you, Senator.

Mr. MARTIN. We believe the Office of Government Ethics should retain the statutory authority to designate separate agencies and components pursuant to Section 207(e) of Title XVIII. That authority was established because it was understood that it would serve no purpose and indeed be unfair to apply 207(c) with respect to a former employee's contacts with an agency whose functions were distinct and separate from those exercised by the particular agency.

As regards the non-statutory designations, they have, however, proved difficult to administer and we recommend that you eliminate that section of the law. We'll go into some detail why it is difficult to administer.

As we pointed out in earlier correspondence to you, Mr. Chairman, the Director does have authority to conduct an investigation to determine whether the functions of a separate statutory or non-statutory component are actually separate.

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[1] See p. 95.

However, as we also indicated, we are not clear what would be gained from such an investigation, and this is based on not only my own experience as Director, but also on the experience of my predecessors.

We would not know, and I would not know what the determination would depend on other than the separate statutory functions and also non-statutory functions in that those determinations should not depend on the unique personality of the head of an agency or a component at a particular time. Therefore, you have to go to the statutory or the authority setting up the agency.

Secondly, to investigate each and every administrative branch as to their separateness would require an enormous staff which we do not have, and I'm not sure we ever will.

Third, it is unclear what we would observe at an executive agency that would actually supplement the written authority. I don't know what we would find out.

Therefore, we believe that the Executive Branch agencies are in the best position to initiate requests to us for separate statutory and non-statutory status, and that is the position that has been taken by my predecessors and which I have adopted rather than being proactive and going out and investigating agencies to make the determinations required under this statute.

As to the statutory determination, the language of 207(a) says whether the agency proposed for designation is a separate statutory agency within a department of an agency which exercises functions that are distinct and separate from the remaining functions of that department or agency.

Two elements to the test: that there is statutory authority for the component agency; and that the component agency actually exercised functions separate from the other functions of the agency.

The Office of Government Ethics has consistently recognized as separate authority a statute, an Executive Order, a reorganization plan or a combination of those three.

The non-statutory determinations, however, are intended well, similarly are intended to provide a recognition of separability where the subordinate agency or bureau was administratively created on the basis of distinct subject matter jurisdiction and upon an additional determination that no undue influence or advantage will result to employees serving in the sub-units.

Now as to third part of your letter requesting us to appear, we addressed the senior designation. That has truly been a most difficult aspect of the Office of Government Ethics.

The administration of that program has raised the following three problems which are set forth in my testimony, but I just would like to mention them.

Timeliness. We could not possibly conduct the examination that is required alone. We have to rely on the agencies. It's a decentralized ethics system with an agency ethics official, as you know, in each agency.

We have, however, endeavored to assist agencies in making their determinations by providing all Federal agency regulations, explanatory memoranda and annual salary schedule updates.

Then we provide position descriptions and any other information necessary for them to make the initial cut or the evaluation, and we follow that up with telephone inquiries.

However, it is just a complex and difficult system, and the determination required to be made, that is supervisory and decision-making responsibilities by the agency, that it has been truly disparate in coming in from the agencies in terms of a small agency might think someone who is, let's say, a Deputy would have overall responsibility for the agency.

A person at the same level, same grade or level in a large agency would not share those same duties. So you will have a disparity, and the agency we believe is in the best position to make that decision.

Because of the sheer volume and the agencies being late with the information, and through our own shorthanded staff we have not been timely with that, and I readily admit that.

Uniformity I mentioned. It varies from small agencies to large agencies as to whether or not someone gets designated or does not get designated.

And then the precisions of the designation, there just is not—that is the determination of whether a position involves significant decision-making or supervisory responsibility is not susceptible to a common definition throughout the Government.

For that reason and because of the administrative problems that we have encountered and my predecessors have encountered, it was beyond schedule when I arrived, and it's about the same schedule now, we recommend that you make the designation, if you continue to designate senior employees, make it automatic at a grade or pay level so that this administrative burden and irregularity, the burden that results in irregularity is at least relieved from our shoulders and make uniform. We think uniformity is the key and is important.

Finally, as to the Executive Office of the President, that decision was made by my predecessor, David Scott. I think it was a fair and well reasoned decision made in good faith. I instructed one of my junior attorneys to—two in fact, to do an analysis and to conduct whatever discussions they wanted to with officials of the Executive Office of the President.

I had Mr. Davis review their analysis. It was prepared under Mr. Davis' supervision. I agree with his conclusion and I agreed with the conclusion that Mr. Scott had made. I do think that we base our decision—Mr. Scott based his decision and my concurrence on the present statutory language which I think requires us to treat all Executive Branch agencies with the same common principles as set forth in the statute, and I think I'm required and obligated to apply those principles uniformly and I did.

So that is the basis of our decision. I think it's a well-documented decision and a fair decision.

With that I will be glad to take any questions you have, Mr. Chairman.

Senator LEVIN. Well, Mr. Martin, we thank you for your testimony.

You heard the GAO testimony and you've read their report I believe. Have you commented on their report to them, by the way?

Mr. MARTIN. I have not. We have had informal discussions with them, and where they found errors, we certainly agreed to correct them. I don't agree with all of their assessment that there is no documentation.

Senator LEVIN. I'm not quite asking you that yet. I just want to know about your comments on their report. Did they ask you for written comments on their report?

Mr. MARTIN. I don't know if they have asked for written comments. Informally we have discussed it.

Senator LEVIN. Now you've heard their comment about documentation for your conclusions, that they have just haven't found it in your files. Have you pointed it out to them? Have you said come on over here and there is the documentation?

Mr. MARTIN. Well, my staff showed them what documentation there was. Let me share with you why I think there isn't some documentation.

When I arrived in the Office of Government Ethics there was an ad hoc filing system. My Administrative Assistant came to me and said, you know, we really ought to bring ourselves within the standard uniform filing and cull our files and make them consistent with past practices.

I agreed to that and assigned him to do it along with some other staff. I think that some of the documentation for those analyses, which were made early on, and these all were made in 1979, 1980 and 1981, and very few have been made in fact I think by Jack Walter, my predecessor who left in late 1982 and by me. So I think there were some documentation that may have been thrown out or destroyed. In fact, I know there was some.

Senator LEVIN. You don't want to use the word "shredded"?

Mr. MARTIN. No, we didn't shred anything. Mr. Davis, in fact, I think found some of the files that he kept in a waste basket. So I think there was better documentation, but I think when we culled files some of it may be missing. But I don't know how much.

Senator LEVIN. Have you required a description of the function of each proposed compartment from the agencies and departments with each request that you have received for compartmentalization?

Mr. MARTIN. Well, I can't speak to that because there have been very few since I've been there. I have not changed the ones that existed.

Senator LEVIN. But the ones that have come in since you've been there, have you required a description of the functions of each proposed compartment in the agencies and departments that have made the requests?

Mr. MARTIN. To the extent that any have come in, yes, I think that would be an accurate statement.

Senator LEVIN. You've said you've got to get me a description of your functions?

Mr. MARTIN. Yes, to the extent that any have come in. I don't if you have some there in front of you.

Senator LEVIN. You've made reference to your EOP analysis.

Mr. MARTIN. Yes.

Senator LEVIN. We've asked for it and we haven't received it.

Mr. MARTIN. Pardon me?

Senator LEVIN. We haven't received your Executive Office of the President analysis that you talked about here a few moments ago.

Mr. MARTIN. You received my letter.

Senator LEVIN. We have not received the analysis that we have requested, the analysis that you referred to that you say justifies that compartmentalization, nor the documentation that you say justifies that.

Mr. MARTIN. Well, I have documentation from White House counsel on that.

Senator LEVIN. And you said there was a lawyer's analysis that you asked for?

Mr. MARTIN. Well, I have had—yes, I've had Mr. Davis and one other attorney——

Senator LEVIN. Why don't you share that with the committee?

Mr. MARTIN. Well, if it's written, I will.

Senator LEVIN. But we asked for it.

Mr. MARTIN. You already asked for that?

Senator LEVIN. Yes.

Mr. MARTIN. Recently?

Senator LEVIN. Have you showed it to the GAO? Have you given it to us? We've asked you for it.

Mr. MARTIN. Well, I would be glad to share it with you.

Senator LEVIN. Is that written documentation?

Mr. MARTIN. Is my analysis written?

Senator LEVIN. No, the analysis of your lawyers that you referred to, is that written documentation that justifies the EOP compartmentalization?

Mr. MARTIN. We have documentation and an analysis from the White House counsel.

Senator LEVIN. How about by your own counsel?

Mr. MARTIN. Do I have a written analysis by—well, I have—no, I don't think I have a written analysis.

Senator LEVIN. I thought you said there was an analysis?

Mr. MARTIN. Well, I didn't say whether it was written or not. We made an analysis of the information we received from the White House counsel at some length.

Senator LEVIN. At some length, but not in writing?

Mr. MARTIN. In many, many meetings over the course of many months.

Senator LEVIN. But there is nothing in writing?

Mr. MARTIN. I don't think I have a documented written analysis with a recommendation. No, I don't.

Senator LEVIN. As I understand your testimony basically on compartmentalization, where the bureaus within the department are specified by law, you've accepted compartmentalization. Is that a fair conclusion?

Mr. MARTIN. Where we can see a separate statutory function by law and we see that their functions are indeed separate, yes. We have not inquired behind that agency's actions to determine how they interact and whether or not it's different depending on who heads the agency.

Senator LEVIN. You haven't gone behind what?

Mr. MARTIN. We have not gone behind the statutory explanations.

Senator LEVIN. The explanations aren't statutory.

Mr. MARTIN. Well, the statutory——

Senator LEVIN. Separation.

Mr. MARTIN. Yes. If in fact we can determine that the functions are separate from that.

Senator LEVIN. You take two steps, one, is there a statutory distinction or classification——

Mr. MARTIN. Correct.

Senator LEVIN [continuing]. And then you also are telling us that you take a second step, and that is are those bureaus separate and distinct, in your opinion——

Mr. MARTIN. In their functions.

Senator LEVIN. In your opinion, are their functions separate and distinct? Is that correct?

Mr. MARTIN. That's correct.

Senator LEVIN. Now where have there been requests for compartmentalization where the statute has classified the bureaus or units separately but you've said no, their functions aren't separate and distinct?

Mr. MARTIN. Since I've been there?

Senator LEVIN. Yes.

Mr. MARTIN. I don't think I've done that.

Senator LEVIN. And how about your predecessor?

Mr. MARTIN. I think one or two. I would have to check that.

Senator LEVIN. Let us know where that has ever been done, if you would.

You agree, though, that there are two separate tests?

Mr. MARTIN. Yes. I stated that in my testimony.

Senator LEVIN. But you just can't offhand think of where the second test has ever stopped compartmentalization from occurring?

Mr. MARTIN. It has not occurred on my watch.

Senator LEVIN. So the second test doesn't mean much.

Mr. MARTIN. Well, it's a part of the test.

Senator LEVIN. Yes, but it hasn't stopped compartmentalization once as far as you know, has it?

Mr. MARTIN. Not by me.

Senator LEVIN. Or as far as you know offhand by any of your predecessors. You can't identify——

Mr. MARTIN. I cannot right now identify one.

Senator LEVIN. Now let's talk about the compartmentalization of the Executive Office of the President.

You believe that those are separate and distinct functions that are shown for five of the nine compartments which we have got up there; is that right?

Mr. MARTIN. I do.

Senator LEVIN. And you've made your own independent analysis?

Mr. MARTIN. I did with the assistance of two of my attorneys.

Senator LEVIN. And you know that one of your predecessors said no way?

Mr. MARTIN. Well, I'm not sure he said no way.

Senator LEVIN. Well, did he say no?

Mr. MARTIN. Well, Mr. Watson, who was in the Carter Administration——

Senator LEVIN. He wasn't your predecessor, was he?

Mr. MARTIN. No, he wasn't.

Senator LEVIN. Watson.

Mr. MARTIN. No, Watson was in the White House.

Senator LEVIN. I know. I'm talking about your predecessor, who as head of OGE said no to Watson, or is that not true?

Mr. MARTIN. Well, it's not entirely accurate, and let me give you the facts.

The facts are these. The White House late in the Carter Administration when they were ready to depart, Mr. Watson sent over a statement and an analysis saying that OGE doesn't even have to make an analysis because we are separate and distinct. And that's what Mr. Walter rejected on the advice of his counsel. So that was rejected, that analysis.

Senator LEVIN. By your predecessor.

Mr. MARTIN. That no action need be taken by anybody, that we are in fact separate and distinct and you don't have any role to play in OGE. That analysis was rejected by Mr. Walter.

Senator LEVIN. And as to the role that OGE has played since then, as far as you know, you're unable to identify one case where the OGE has applied the functional separate and distinct second step?

Mr. MARTIN. Through statutory request.

Senator LEVIN. Of course.

Mr. MARTIN. I am unable to——

Senator LEVIN. There may be, but you can't identify any.

Mr. MARTIN. Mr. Davis tells me we have some and he will provide them.

Senator LEVIN. None that you've been involved in personally?

Mr. MARTIN. I will have to confer.

Mr. Davis tells me there are several, but not when I was there. So I'm unfamiliar with them, but we will provide you with them.[1]

I will tell you that we are having an ongoing, which I don't like to get into, but I will, we have an ongoing analysis now with the Department of Treasury where we are having a dispute, and we will let you know of the results of that.

Senator LEVIN. Now referring to this chart, it shows that five of the major compartments of the Executive Office of the President, five of the nine you've approved the compartmentalization of——

Mr. MARTIN. I haven't approved anything.

Senator LEVIN. Well, you concurred.

Mr. MARTIN. I concurred, that's correct.

Senator LEVIN. As I understand the statutory scheme, the head of each compartment is prohibited from making post-employment contacts throughout the entire Executive Office, the head of each compartment.

Mr. MARTIN. Correct.

Senator LEVIN. All right. So Howard Baker, for instance, couldn't lobby any of the nine for one year after he leaves.

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[1] See p. 145.

However, the Deputies, and that's what I want to refer to now, are prohibited from contacting only their own compartment; is that correct?

Mr. MARTIN. That's correct.

Senator LEVIN. All right. Now let's say the Deputy Director of OMB, Joe Wright, let's assume he leaves. At that point the Deputy Director of OMB is able to contact anybody in the Executive Office except for people in the OMB compartment; is that correct?

Mr. MARTIN. That is correct.

Senator LEVIN. Now Frank Carlucci, for instance, who is the Assistant to the President for National Security Affairs, in the left compartment over there, can contact anybody else in those compartments, in any other compartment. He can't contact people in his own compartment and he can't contact Howard Baker, the Chief of Staff, but he can contact anybody else in any of those other compartments; is that correct?

Mr. MARTIN. Mr. Chairman, I think he's the head of a separate component, and he would not be able to contact anyone.

Senator LEVIN. Which compartment?

Mr. MARTIN. He's in the National Security Council. So he's barred. His Deputy, however——

Senator LEVIN. His title is Assistant to the President for National Security Affairs.

Mr. MARTIN. But I think he is also the head of a separate statutory component.

Senator LEVIN. And he is on the White House payroll, right?

Mr. MARTIN. That's right, but I think he is also head of a separate statutory component called the National Security Council, and I think he's barred.

Senator LEVIN. Even though he is on this payroll?

Mr. MARTIN. That's how I would interpret it. If he's the head of a separate statutory component, that's how I would interpret it.

Senator LEVIN. So his Deputy then can contact—I think you're probably wrong, and I think it's very unclear at best, but let's assume you're right for the moment. His Deputy, Carlucci's Deputy, can contact anybody on the National Security Council?

Mr. MARTIN. On the National Security Council?

Senator LEVIN. Yes.

Mr. MARTIN. Not if he is a senior designated employee, he is not automatic or so designated.

Senator LEVIN. I'm saying his Deputy.

Mr. MARTIN. Well, if he's so designated. You know, if his Deputy, and he's so designated as a senior designated employee, he is barred from the National Security Council.

Senator LEVIN. I'm just talking about his assistant on the left chart in the White House, Carlucci's assistant there.

Mr. MARTIN. Right.

Senator LEVIN. How many assistants does he have? Does he have more than one?

Mr. MARTIN. Mr. Carlucci?

Senator LEVIN. Yes.

Mr. MARTIN. He has a staff. I don't know how many there are. I don't know their titles or names.

Senator LEVIN. But you're saying that there is one person on his staff who can't contact the NSC?

Mr. MARTIN. Yes, based on a hypothetical——

Senator LEVIN. Just that one designated person.

Mr. MARTIN. If he is so designated, but you know——

Senator LEVIN. But can everybody else on his staff contact the NSC?

Mr. MARTIN. Well, it depends on their responsibility and whether or not they are so designated as a senior employee, and some may be automatics, and you know what I mean by automatics.

Senator LEVIN. Let me just tell you now what we've received from the White House.

"Dear Senator Levin"—and this is dated May 26th—"I'm enclosing the information you requested with respect to the positions designated by the Executive Office of the President agencies under the provisions of 18 USC 207(e). This information appears as Attachment A."

Then on Attachment A we've got a National Security Council, with a statutory Executive Secretary, and we've got designated staff positions for the National Security Council.

Carlucci is not listed there. Where he is listed is under the White House Office. He's just not listed where you want to put him.

Mr. MARTIN. You mean Carlucci's Deputy.

Senator LEVIN. No, Carlucci.

Mr. DAVIS. Mr. Chairman——

Senator LEVIN. Now, look, this is White House stationery.

Mr. DAVIS. It's the phrase "designated" that I think is confusing, sir, if I might add.

Senator LEVIN. Have you seen this letter, Mr. Davis?

Mr. DAVIS. I saw the letter, sir, and I think what we're talking about here is that you have to draw a distinction between 207(d)1(a) and (d)1(b) which are automatic and (d)1(c) which are designations as your questions use them. So that when we talk in terms of designation, we are talking (d)1(c). These are paid positions at lower levels.

Mr. MARTIN. These may be automatic is what we're saying to you, and I don't know if they are.

Senator LEVIN. Isn't this a statutory compartmentalization?

Mr. DAVIS. But it doesn't make any difference. We're talking about——

Senator LEVIN. Is this a statutory compartmentalization?

Mr. DAVIS. That's correct.

Mr. MARTIN. Yes.

Mr. DAVIS. But we are talking about apples and oranges. When you say are they designated, when you're talking about individual positions being designated, you're talking about three categories. You're talking about (d)1(a), which are your high-level executives, 1 through 5, (d)1(b), which are uniform, which are automatic, and he fits in one of those categories, and then you have designated which is the response to your letter I think which are the discretionary designations under (d)1(c).

Mr. MARTIN. Senator, I'm not——

Senator LEVIN. Let me just interrupt you for a second. We have both the statutory and the designated people on the list.

Mr. DAVIS. I'm not familiar with the enclosure, but I think that perhaps maybe that might be some of the confusion if you use the word "designated," and I'm not familiar with their submission.

Senator LEVIN. On this enclosure we have both the statutory people and we have the designated people both listed and his name isn't here because he is not on the National Security Council.

Mr. MARTIN. Who isn't?

Senator LEVIN. Carlucci.

Mr. MARTIN. He's not on it? I don't know. I thought he was the head of it.

Senator LEVIN. He is not even on the payroll of the National Security Council. He is on the payroll of the White House Office.

Mr. MARTIN. Senator, I'm not in a position to know that right now. I mean I certainly would like to find out, but we designate——

Senator LEVIN. Carlucci is not on it. He's an official of the National Security Council. He's not on the National Security Council.

Mr. MARTIN. Well, I know he is an automatic designated senior employee.

Senator LEVIN. Let me ask you, how would a person advise Carlucci or try to prosecute anybody when they've got something on official White House stationery which shows that he is not on the list? How could a person ever be able to give advice or be able to prosecute anybody with this kind of confusion?

Mr. MARTIN. Not easily, but I mean I didn't write the law.

Senator LEVIN. Wait a minute, you concurred in that compartmentalization.

Mr. MARTIN. That's right, and I followed the law.

Senator LEVIN. And without that compartmentalization there wouldn't be this kind of confusion in the office of the——

Mr. MARTIN. That's right, and I followed the strict letter of the law and observed it uniformly as did my staff, and I thought it was the proper decision.

Senator LEVIN. Were you here for Mr. Eizenstat's testimony?

Mr. MARTIN. I heard part of it.

Senator LEVIN. Did you understand that the whole purpose of that office is to integrate functions, and that there are constant interrelationships, contacts and coordination?

Mr. MARTIN. Well, that isn't true only at the White House. I mean you take the Department of the Treasury——

Senator LEVIN. I'm not saying it is. All I'm saying is are you familiar with that? Now you say those compartments are separate and distinct. Let me tell you what the Congress told you.

Here is what the Congress told you, that we are supposed to have compartments only in those kinds of exceptional and clear cases where an agency exercising wholly separate and distinct functions happens to be contained within a department.

That's what the Congress told you in the report accompanying this bill.

Mr. MARTIN. Let me just say, Senator, the law is not a model of clarity, and if you try to apply it uniformly throughout the Government, you're going to have what you have now.

I was Chief Counsel at the Secret Service, and let me tell you we had meetings with the General Counsel at Treasury all the time,

and present were Chief Counsel at the IRS, Chief Counsel at ATF and we talked about cross- fertilization of ideas and interests. All of that went on and they are all separate components now.

I'm saying to you that if I'm going to apply the law uniformly, I'm going to apply it uniformly.

Senator LEVIN. There is no doubt about that, but I don't think—well, more important than what I think, GAO doesn't think you've applied the law with any basis. GAO can't find a basis for your concurrence or your approval of separate compartments for the Executive Office of the President. They just can't find a basis.

Mr. MARTIN. Well, I respectfully disagree with them and I think they are wrong. We educated them on this.

Senator LEVIN. All right. Now you're saying those are all separate and distinct functions, right?

Mr. MARTIN. I'm saying pursuant to the statutory scheme they are.

Senator LEVIN. Which function does Carlucci belong in, the White House function or the NSC function?

Mr. MARTIN. As far as the information before me, he in the National Security Council.

Senator LEVIN. He doesn't even belong in the White House and that's where they list him. The Assistant to the President for National Security Affairs—he's on the White House payroll but you're saying he doesn't belong in that function, and that's clearly distinct and separate. He clearly and distinctly belongs in the National Security Council, of which he is not a member and of which he is an official, and he doesn't belong in the function that he's on the payroll of, and that's clear and distinct.

And you're saying that that scheme meets the Congressional test of an exceptional and clear case of someone exercising a wholly separate and distinct function.

Mr. MARTIN. Well, let me just say this. I'm going to check on Carlucci's position and role and I'll get back to you, but the point is well taken.

Senator LEVIN. I want to ask you a real clear question. You're saying that Carlucci clearly and distinctly does not belong in that White House compartment. That's what you're saying.

Mr. MARTIN. I mean I can't say that. I'm saying based on the statutory information before me, that would be my conclusion.

Senator LEVIN. Well, let me ask you this question. Is he clearly or distinctly in one or the other?

Mr. MARTIN. The only answer I can give you is this. Whoever is the head of the National Security Council——

Senator LEVIN. Head? Chairman?

Mr. MARTIN. Whoever has in terms of 207, has a disability that runs not only in terms of 207(c), that runs not only to the National Security Council, but to the entire rest of the White House complex.

Senator LEVIN. Well, that's clear.

Mr. MARTIN. That's all I can tell you. Now if in fact he exercises other functions within the White House, it's meaningless to me because he suffers the disability as the head of the National Security Council.

Senator LEVIN. Well, all I can tell you, Mr. Martin, is you had better check with the White House.

Mr. MARTIN. Well, I'll do that. I'll certainly do that.

Senator LEVIN. Because again, let me tell you, the White House says what that chart says, and that is it puts the Assistant to the President for National Security Affairs where he is on the payroll, and that's the White House compartment. However, you don't. You say he belongs in the National Security Council compartment, even though again he is not a member of that Council compartment.

Mr. MARTIN. He's the Chairman of it, and that's where I put him for 207 purposes.

Senator LEVIN. Let me give you now the members of the National Security Council. The President, the Vice President, the Secretary of State and the Secretary of Defense are the members of the National Security Council. He is not the Chairman. The statutory advisers are the Director of Central Intelligence and the Chairman of the Joint Chiefs of Staff, and there are then a number of officials, which he is one.

In any event, you had better, if you would, check with the White House and tell us for the record as to where it is that you think that——

Mr. MARTIN. That Mr. Carlucci belongs. Let me just say I'll do that, but I——

Senator LEVIN. It's a pretty important question. It's illustrative of just the total lack of distinct functions that are in those compartments. Now you've approved that.

Mr. MARTIN. We deal in positions and not names, but I certainly will.

Senator LEVIN. Oh, of course.

Mr. MARTIN. I can't deal in names.

Senator LEVIN. Oh, of course, you deal in positions and not names.

Now let's go back to another issue, and that's where the Deputy in the OMB—do you see that fourth compartment over to the right?

Mr. MARTIN. Yes, I do.

Senator LEVIN. Under the approach that you've approved, the Deputy Director of the OMB can lobby the White House.

Mr. MARTIN. Yes, he can. He may not go back to OMB.

Senator LEVIN. He can't lobby OMB, but he can lobby the White House.

Mr. MARTIN. Within one year.

Senator LEVIN. He can lobby the National Security Council and he can lobby the Trade Representative.

The Deputy Director has daily contact with the Office of the Trade Representative about budget, if not daily, weekly.

Mr. MARTIN. Well, with everyone about the budget.

Senator LEVIN. They are both in the Executive Office of the President, and he's got a critical budget connection to him, and you're saying there is no appearance problem here?

Mr. MARTIN. I'm not saying that. I'm saying there is a separate statutory function and they perform separate functions. But Mr. Wright, I mean the Deputy Director of OMB has that same budget function with every Executive agency in the Government.

Senator LEVIN. Indeed he does, but he has daily contacts within the Executive Office of the President because he has to coordinate with all those other functions, and they have to integrate those other functions.

Mr. MARTIN. He's responsible for the Federal budget and management of the Government.

Senator LEVIN. And do you believe that serves the purpose of this statute, which is to prevent high-level officials immediately upon leaving the Government from coming back and feathering their own nest and lobbying their former colleagues? That's the purpose of the statute.

Mr. MARTIN. The purpose of it, Senator, I'm well aware is to preserve integrity in Government and prevent influence, and I deal with it every day.

Senator LEVIN. And you have no problem with the purpose of it?

Mr. MARTIN. With the purpose of the statute?

Senator LEVIN. Yes.

Mr. MARTIN. Absolutely not.

Senator LEVIN. Putting aside what you are required to do, and I understand that, is the purpose of this statute served by that compartmentalization? I totally disagree with you as to whether you're required or whether your predecessor was required to approve that. That disagreement is clear, those functions aren't separate and distinct and the Carlucci position proves it, Mr. Eizenstat's testimony doesn't, but they both do.

But putting aside just for the moment as to whether the compartments are separate and distinct, you could say, well, wait a minute, the statute tells me that I've got to go and make some kind of an assessment here. Also, putting aside this other piece of today's testimony, which is that the GAO can't find any justification for your conclusion anywhere in the files.

Well, lay that aside——

Mr. MARTIN. I don't agree with that.

Senator LEVIN. I understand. We're going to lay that aside. And let's assume for the moment you're right, those are separate and distinct functions. Just for the sake of argument, we'll agree with you.

Does that result carry out the function of the statute and, if not, shouldn't we change it?

Mr. MARTIN. You're getting into a philosophical question and a policy question which I'm not real comfortable with, but if you're going to change it, and I'll make some specific recommendations in writing to you if you would like me to on what I think should be done. I would make it uniform whatever you do because I think you've got to treat the Executive Branch as the Executive Branch and the Legislative Branch as the Legislative Branch.

Senator LEVIN. I would agree with you on that.

Mr. MARTIN. I would make it uniform if you're going to change it.

Senator LEVIN. Yes, I would agree with you on that, but my question just has to do with the compartmentalization issue.

Let's assume again that you're right, that there is full justification for compartmentalizing the Executive Office of the President. Does the result, which I have just described to you, that you can

have a Deputy Director of OMB, for instance, going back and lobbying all these other compartment heads, does that carry out the purpose of this statute? That's my question?

Mr. MARTIN. You're asking me if there is a potential for abuse or influence by the Deputy Director at OMB, and I'm saying to you that that potential exists and it exists under the present statutory scheme for people who work together, let's say the Cabinet. A Deputy Director at——

Senator LEVIN. Well, I couldn't agree with you more. We'll get to that in a moment.

Mr. MARTIN. I think it's the same ball of wax.

Senator LEVIN. I just want to talk about compartmentalization. I want to know whether or not the results—assuming this has been properly applied, that you've got justification that the compartments are clear and distinct, conclusions that I disagree with but we'll accept for the purpose of debate—does this lead to a scheme which carries out the statutory purpose? That's my question.

Mr. MARTIN. You're asking me, is there a potential for abuse? There always is.

Senator LEVIN. In your opinion, does that result carry out the statutory purpose of building public confidence that high-level officials will not go back to their agencies and——

Mr. MARTIN. It's kind of an unfair question, because I carried out the statutory schemes Congress enacted to the best of my ability. So then you're asking me——

Senator LEVIN. I've challenged that earlier this morning, but I'm not challenging that right at the moment. I'm saying assume you've carried out your statutory scheme the way it was designed. I'm then saying does the result carry out the statutory purpose, which is to build confidence in the Government that high-level officials are not going back to lobby their own agencies?

Mr. MARTIN. I don't have an easy answer for you. I think that there is always a potential for influence, and that's the best I can give you.

Senator LEVIN. You can't directly answer that question?

Mr. MARTIN. I think I've answered it to the best of my ability.

Senator LEVIN. I'm talking about that, that chart.

Mr. MARTIN. I'm answering you.

Senator LEVIN. Does that compartmentalization carry out the statutory purpose, even assuming you've done the separate and distinct part fairly and with good documentation?

Is that what you think Congress intended? That's all I'm asking. Philosophically I'm asking you.

Mr. MARTIN. Well, you're asking me and I think I answered it. There is a potential for influence in that situation as well as many others.

Senator LEVIN. Now let me talk about that situation. Did you have conversations with people in the Executive Office of the President relative to your concurrence in this scheme?

Mr. MARTIN. I had some conversations, and also one of my assistants did as well as, I think, one of my attorneys.

Senator LEVIN. Can you give us the nature of those conversations?

Mr. MARTIN. I had several discussions and perhaps one meeting with the Counsel to the President.

Senator LEVIN. Who was that?

Mr. MARTIN. Peter Wallison at the time.

Senator LEVIN. At the time it was Mr. Wallison?

Mr. MARTIN. It was.

Senator LEVIN. Was he arguing for that?

Mr. MARTIN. Yes, he was. I have a letter from him which I'm surprised you don't have. You don't have that?

Senator LEVIN. I don't know whether we have that or not. We don't.

Mr. MARTIN. Well, I'll make it available to you. I mean I have that letter and that letter was the culmination of a lengthy discussion period.

Senator LEVIN. Did anyone on your staff recommend against approval of this particular compartmentalization?

Mr. MARTIN. Did they recommend against it? No one on my staff recommended that I change the decision that Mr. Scott had made in 1983.

Senator LEVIN. Do you know whether anyone on his staff recommended against that?

Mr. MARTIN. On Mr. Wallison's staff?

Senator LEVIN. No, on Mr. Scott's staff.

Mr. MARTIN. Mr. Davis was there. Let him answer.

Mr. DAVIS. Senator, as best as I can recollect, the initial decision on this issue, when the initial letter came over, we went back with a response, and I think the committee has the entire package of that correspondence.

Senator LEVIN. I just want to know if there was anyone on your staff who recommended against approval of that request?

Mr. DAVIS. As I recall, there was some discussion in the one particular sub-unit where the concern was registered and it was not one that was listed here, which was the Office of the Vice President. That's the one we were concerned about at the time.

That's the only one, as I recall, where the concern was registered at that time.

The way this thing was handled, Senator——

Senator LEVIN. So the only objection that was voiced by anybody on your staff at the time was relative to the second compartment, the Office of the Vice President?

Mr. DAVIS. That's my recollection of it.

Senator LEVIN. And who was the counsel in the White House at that time? Was that also Mr. Wallison?

Mr. DAVIS. No, sir.

Mr. MARTIN. No, no.

Senator LEVIN. Who did you have your conversation with?

Mr. DAVIS. That was in Mr. Fielding's shop, sir. We had conversations with Mr. Fielding and members of his office. As I recall, the staff attorney that was handling that was Sherry Cooksie at the time.

Senator LEVIN. It was in Mr. Fielding's office at that time?

Mr. DAVIS. That's correct, sir.

Mr. MARTIN. Senator, I want to add something here that it's history, but when this issue first came up and when I arrived in the

office, there was a senior attorney, Saul Lindenbaum, whose name you may know, a respected attorney at Justice and then later at OPM who was a guru in this arena. My recollection is that either Mr. Scott or Mr. Walter, Jack Walter told me. He was called in and requested to analyze this as an outside consultant, and he came to this conclusion for David Scott, as I recall, and——

Senator LEVIN. For who?

Mr. MARTIN. For David Scott's decision in 1983. So it was an outside retired senior fellow who has dealt in this arena all his life for the Government who formulated this decision for David Scott.

Senator LEVIN. Let me see if I understand the conclusions which you have given us in your recommendation.

No. 1, you urge the Congress to eliminate the designation of senior officials.

Mr. MARTIN. Non-statutory I do.

Senator LEVIN. We should have statutory designations? If you're above it, that's it. If you're below it, you're okay. Right?

Mr. MARTIN. That's correct. I don't think you should require this office to go—you would need a voluminous staff to make——

Senator LEVIN. I'm not disagreeing with you. I mean you obviously haven't been able to handle that well, you acknowledge it, and you haven't had the staff to do it well and you've been late in your publications.

On the compartmentalization issue you believe we should continue to compartmentalize?

Mr. MARTIN. Statutory?

Senator LEVIN. Yes.

Mr. MARTIN. Yes, I think it's fair to do that.

Senator LEVIN. And would you change the statute relative to the wording requiring separate functions, or would you leave it the way it is?

Mr. MARTIN. I would leave it the way it is.

Senator LEVIN. So in terms of statutory compartmentalization, you would leave it the way it is with the same kind of two tests.

Mr. MARTIN. I'm sorry, sir. Yes, sir.

Senator LEVIN. And would you change the breadth of the prohibition?

Mr. MARTIN. Do you mean the 207(c) application? Well, if I did, I would make it uniform for all three branches of Government.

Senator LEVIN. Within the branch?

Mr. MARTIN. Yes.

Senator LEVIN. You would prohibit contacts in the branch that——

Mr. MARTIN. Well, no. I would retain compartmentalization, but if you're going to extend it, I would extend it for all branches.

Senator LEVIN. Would you prohibit any person from contacting an agency other than his own agency? Now I'm not talking about compartments. I'm just saying within a whole agency.

Mr. MARTIN. No, I wouldn't. In other words, if you work at State would you prohibit someone from contacting Justice?

Senator LEVIN. Right.

Mr. MARTIN. No.

Senator LEVIN. If you have someone that is working at NSC you wouldn't stop them from contacting the Defense Department?

Mr. MARTIN. No. I would also, Senator, recommend that on the designations that you make it automatic somehow, and we would be glad to work with you on it. It really is—that Rubic's Cube you showed up—it takes Mr. Davis and maybe two other attorneys on my staff when we get a tough one to really figure it out, and I don't know how you would ever—I agree with you, I don't know how you would ever prosecute somebody for an intentional violation if in fact they were uncertain of their status. And it truly does work out differently whether you are an automatic executive class in a statutory or a designated than in a non- statutory.

You may be performing identical functions, but you suffer different disabilities. So that also needs to be cleared up. So I think if you eliminate the non-statutory you do that.

Senator LEVIN. Just a couple more questions and then we'll be on to our Justice Department witness.

The 1987 Code of Federal Regulations lists the Independent Counsel as a separate compartment of the Justice Department, but the Justice Department tells us it is no longer a compartment.

Mr. MARTIN. They do?

Senator LEVIN. They do.

Mr. MARTIN. I'm not aware of that, but I'll certainly look into that.

Senator LEVIN. The regulations may be wrong; is that correct?

Mr. MARTIN. Pardon me?

Senator LEVIN. If they are right, then your regulations are wrong?

Mr. MARTIN. If they're right, my regulations are wrong, but I don't think I'm wrong.

Senator LEVIN. Then the 1987 Code of Federal Regulations lists every division of the Justice Department as a separate compartment but the Civil Division. Is that a mistake or is that a conscious decision?

Mr. MARTIN. The Civil Division?

Senator LEVIN. Yes.

Mr. MARTIN. I thought it was the Antitrust Division.

Mr. DAVIS. We would be happy to provide that. We have two separate sets of correspondence which I think we had turned over to the GAO, but if we haven't, we certainly would.

There was a request for separate 207(e) determinations, the separate compartment, and then there was a subsequent request for non-statutory component determinations, and it's my recollection, Mr. Chairman, that we rejected some of the units that they included.

I specifically recall that we rejected the Office of the Solicitor at that time because we felt that there was interaction between the Solicitor's office on appeals, and we rejected it on that basis.

Mr. MARTIN. We'll look at that.

Senator LEVIN. As far as you know, the Civil Division is a separate compartment?

Mr. MARTIN. So far as I know.

Senator LEVIN. The regs don't list it.

Mr. MARTIN. As non-statutory, Senator?

Senator LEVIN. You've got every division. You've got the Antitrust Division listed as a separate component——

Mr. MARTIN. Maybe it's listed as a separate non-statutory.

Senator LEVIN. It's just not.

Mr. MARTIN. If not, it should be.

Mr. DAVIS. Senator, it's 737.32 where you'll find it listed.

Mr. MARTIN. Page 503.

Senator LEVIN. Where is it because we are having trouble finding it.

Mr. MARTIN. It's 503 under the Department of Justice. Do you want me to bring it up?

Mr. DAVIS. Senator it's listed as a separate non-statutory sub-unit.

Senator LEVIN. Is it in the left column or the right column on 503?

Mr. DAVIS. It's in the left column.

Senator LEVIN. Of 503?

Mr. DAVIS. Excuse me, Senator. You're right, Senator. Civil Rights is what I looked at. You're correct.

Senator LEVIN. You don't see Civil Division there any where do you?

Mr. MARTIN. I don't see Civil Division. I'll have to inquire about that.

Mr. DAVIS. We have the correspondence which we could make available. I don't know if they made the request for the Civil Division. I recall distinctly that the Office of the Solicitor was rejected in meetings that we had with them.

Senator LEVIN. We want to thank you both, and we'll have questions for the record for you, and we will expect you to supply for the record the materials relative to the Executive Office of the President which have not been supplied to us.

Mr. MARTIN. We'll do that, sir.

Mr. DAVIS. Senator, I would comment on your chart. I would be happy to provide—I think there is an error in what we have here.

Senator LEVIN. Good. I was going to ask you that because we asked the GAO whether they agree with us, and they said that they did, and we were going to ask you whether or not you disagreed because there may be a disagreement between you and the GAO. Is there?

Mr. MARTIN. There is an error.

Mr. DAVIS. We think the anomaly created by the language of the statute where you have the executive level employees having the opportunity of going back to the parent when you have a separate statutory determination made, and then you take a look at the non based on subject matter and jurisdiction, the language of (d)1(c) does not give any relief to the executive level employees.

So under your chart we would have to ask an additional question over here as the head of one of these sub-units whether you were executive level or designated under (d)1(c) by our office. So you would have to——

Senator LEVIN. So there would be an additional question you have to ask?

Mr. DAVIS. You have to ask an additional question.

Senator LEVIN. It's even more complicated than that.

Mr. DAVIS. Yes.

Senator LEVIN. Now did you hear the two questions I asked the GAO at the end of the testimony?

Mr. MARTIN. I did not.

Senator LEVIN. Did either of you hear them?

Mr. DAVIS. I'm not sure.

Senator LEVIN. I was wondering whether you would give a different answer to that.

The chart shows that if a senior official is the head of a statutory compartment, that he or she is barred from lobbying the parent agency; is that correct?

Mr. MARTIN. Statutory?

Senator LEVIN. Yes.

Mr. MARTIN. Yes.

Mr. DAVIS. That's correct.

Senator LEVIN. And is it your understanding that the head is barred from lobbying other statutory compartments in the parent agency, too?

Mr. DAVIS. In the parent, yes.

Senator LEVIN. So you answered that question the same way the GAO did.

Mr. DAVIS. Yes.

Senator LEVIN. I'm talking about other statutory compartments in the parent agency.

Mr. MARTIN. If it's executive, yes.

Senator LEVIN. Other statutory compartments.

Mr. DAVIS. Yes, that's correct, Senator.

Senator LEVIN. We will welcome any other additions you have to this chart or any other comments that you want to make.

Mr. DAVIS. We've created another that we would be happy to give you that we think it gets to it a little quicker.

Senator LEVIN. So it's more complicated even than this one, right?

Mr. MARTIN. No, no. I think it clarifies it a little.

Senator LEVIN. All right. But is it less complicated?

Mr. MARTIN. Yes. It's simple.

Senator LEVIN. Are there fewer questions that have to be asked?

Mr. MARTIN. If you get past one, go to two and go to three.

Senator LEVIN. But there are not fewer questions that have to be asked?

Mr. MARTIN. No.

Senator LEVIN. It's just laid out a little more simply?

Mr. MARTIN. Yes.

Senator LEVIN. Well, I would hope so.

Mr. MARTIN. We'll provide that to you.

Senator LEVIN. Thank you.

Mr. MARTIN. And we'll also give you our—we would love to work with your staff on amending this law, Senator. I think it really needs it.[1]

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[1] See p. 120.

Senator LEVIN. Thank you so much.

Our next witness, if he is still with us, is Mr. Joe Whitley, who is the Deputy Assistant Attorney General, Criminal Division. Am I pronouncing your name correctly?

Mr. WHITLEY. Yes, sir, you are.

Senator LEVIN. Thank you. And are you accompanied then by G. Alan Carver, Jr., who is the Director of the Conflicts-of-Interest Crimes Branch of the Public Integrity Section. Did I get your title right? I think I pronounced your name correctly.

Mr. CARVER. That's correct, Senator.

Senator LEVIN. Thank you, Mr. Carver.

Could you be very brief in your statement because most of your written statement is just a restatement of the law.

Mr. WHITLEY. Yes, sir, I'll be brief.

Senator LEVIN. If you would, just give us a comment or two on it because it really is just a restatement.

TESTIMONY OF JOE D. WHITLEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY G. ALAN CARVER, JR., DIRECTOR, CONFLICTS-OF-INTEREST CRIMES BRANCH, PUBLIC INTEGRITY SECTION, CRIMINAL DIVISION

Mr. WHITLEY. Yes, sir. I won't go through any prepared remarks other than to say that it is a pleasure to be here this morning to appear on behalf of the Department of Justice on this very important issue along with Mr. Carver, who I've asked to assist me in responding to any questions you might have for us here today.

You have been provided, as you've indicated, with our written testimony,[1] and I will oblige your request and not rehash those remarks therein, Senator.

My oral remarks will be extremely short, but I would like to say that we would like to address those questions addressed to us in your letter and Senator Cohen's letter of June 11, 1987, to the Attorney General.

I would like to make a couple of brief comments about 18 USC 207 if I may.

In April of last year my most able and distinguished colleague, Deputy Assistant Attorney General Jack Keeney, appeared before the Senate Judiciary Committee and gave testimony on then S. 2334.

At that time Mr. Keeney made several suggestions to the Judiciary Committee on how 207 might be improved and strengthened.

Yesterday I received a copy of S. 237 which I believe is a bill that the Senator has been referring to in his comments. I have not had an opportunity to review this particular bill, but I will be pleased to do so upon your request to do so.

I should note that in that particular bill that many of Mr. Keeney's suggestions are incorporated.

The present Section 207 establishes rules for those in Government about what situations as a matter of law create conflicts of interest and should operate as a deterrent to those who seek to

[1] See p. 104.

take advantage of their previous relationship to an agency of the United States Government.

We think that this deterrence, however, should be weighed against the best interests of society to encourage its citizens to work in Government and to consider such service an honor and a privilege, and at the same time not to punish them with unreasonable penalties unrelated to any genuine conflict of interest on their leaving Government for other employment.

Our position in the past, and it remains so today, is to work closely with you and Congress to make any adjustments to 207 and other statutes to accomplish this objective.

I hope that we can through today's formal testimony and in less formal settings discuss these matters and reach a consensus of what is needed to strengthen this law.

As I have noted in the past, DOJ has made known to Congress several proposals for adjusting 207 that would, we believe, enhance the enforcement of that law.

Some of those are set out at page 12 of my prepared testimony. I will not address those in light of the Chairman's remarks about the time constraints.

Now briefly as to the questions in your letter of June 11th.

Let me address those by saying it is the considered opinion of the Department in response to your first question as to whether current statutory standards are sufficiently clear enough to establish when OGE should designate a Department or Agency by compartments, this is a question that is better addressed to OGE.

As a practical matter our perspective in terms of this particular designation occurs only after the designation occurs. Then there is greater clarity for us because we are on the tailend of the process. In that event, our resource would be the Code of Federal Regulations.

It is nonetheless apparent to me from looking at this chart that has been prepared I believe by Dr. Charlene Simmons of your staff that the designation process is not one that lends itself to simplicity, and it could be burdensome to the OGE.

As an aside, I should note that in S. 237 there is a substantial change in 18 USC 207 which from my cursory reading does away altogether with compartmentalization. This is of course one remedy, but I'm not prepared to say that it is the only way of solving the problems under review by this subcommittee.

My response to your second question, should compartmentalization be uniform throughout the various Departments and Agencies of the Executive Branch, would again be similar to my first answer.

Again, OGE would be better able to respond. But let me say at present OGE must rely on the expertise of the concerned agencies for the why's, when's, where's and how's of compartmentalization, and this invariably can cause inconsistency.

As to your third question dealing with senior employees under the statutory and special designations, you asked are these designations sufficient to cover all senior level employees with policy-making or supervisory responsibility.

Again, we understand that there are variances as a result of the interpretation of 207 from agency to agency, and we would again

defer to OGE in responding to this question as they have already done so because of their practical experience in administering the statute.

As has been recommended by S. 237, automatic designations would address this problem. But at the Department of Justice, as we have previously testified, we question whether this takes into account in a fair fashion the rights of individual employees who need to earn a living post-employment.

As to your fourth question, would eliminating the role of OGE to compartmentalize Departments and Agencies for purposes of 18 USC 207(e) enhance the Department of Justice's ability to prosecute alleged violations of the one-year contact law, as we have stated, we have no reason to set forth an appropriate way of dealing with the compartmentalization process.

We feel as though an appropriate way might be to set forth certain lines, as you have indicated in your opening remarks, which might create more clarity for the individual employee. So arguably there would be less gray area so an employee would know whether or not they were within a certain employment range or not.

The question is in concluding is what are the problems we are trying to correct and are they worthy of such strong remedies as may be suggested by S. 237. Perhaps an overbroad application of the law might occur where there is no actual harm.

Then one final comment I should make. As to your fifth question, I understand that OLC and the Department of Justice in consultation with the White House has responded to you by way of letter to that particular question. I believe there has been some discussion already about what that response was.

Thank you for the opportunity to appear in front of you, Senator, and we are prepared to answer any questions you might have for us.

Senator LEVIN. Thank you very much Mr. Whitley.

The Justice Department has made each U.S. Attorney's Office, and I understand that there are 95 of them, a separate compartment, and I'm wondering whether that really reflects reality. Aren't U.S. Attorneys in regular contact with Justice Department officials on a whole host of important policy and personnel decisions?

For instance, does it make sense that the U.S. Attorney in New York, who is in charge of the biggest Wall Street insider cases in recent memory as well as major organized crime investigations could lobby the Attorney General or anyone else in the Attorney General's office the day after the U.S. Attorney leaves his job, but one of ten Staff Directors for the Justice Management Division, for instance, could not?

Does that really carry out the statutory purpose?

Mr. WHITLEY. Senator, I'm going to defer to an expert on this subject, Mr. Carver.

Mr. CARVER. Senator, in response, the designations of these individuals that are made within the Department of Justice are matters that the Criminal Division is not involved in at all. There are people, I'm sure, within the Department who deal in that area, and we don't, who would be better able to respond to you about the ra-

tionalizations for that and could give you a better answer than I can.

I think our experience is in the area of enforcing the criminal law and in the realm of enforcement and not in the realm of designation.

Senator LEVIN. Not in the realm of what?

Mr. CARVER. Of designation.

Senator LEVIN. Can either of you then comment on why the Civil Division wasn't compartmentalized?

Mr. WHITLEY. Yes, sir. We were informed a few moments ago from someone in the audience, and we'll clarify or find if this is in fact the case, it's my understanding that through a clerical error, Senator, that was deleted for some reason from the Code of Federal Regulations, but should be included in there as a separate compartment.

Senator LEVIN. So you intended to compartmentalize it?

Mr. WHITLEY. That's my understanding. Again, we are not in a position to comment on whether that was the case.

Senator LEVIN. If it's not listed in the Code, then you can't—what is the impact on criminal prosecutions?

Mr. CARVER. The impact would be simply this. If I were examining a referral and I looked at the CFR and there was no proper designation or no designation published in the Federal Register as must be done, there would be certainly no violation whether it was expected that someone were to be designated or not. It must be done appropriately.

Senator LEVIN. Well, if there is not a separate compartment, that means that the person is prevented from touching base with anybody in——

Mr. CARVER. Technically that's true. Now obviously, too, in considering matters if it were apparent that in that situation you had a good faith mistake, I can't imagine any prosecutor who would even consider proceeding in that kind of situation.

Senator LEVIN. All right.

Do you have a current position on the compartmentalization of the Executive Office of the President?

Mr. WHITLEY. No, sir, I don't.

Senator LEVIN. Either one of you?

Mr. CARVER. No, sir.

Senator LEVIN. The Independent Counsel is listed in the 1987 Code of Federal Regulations as a separate compartment of the Justice Department. Now what was the basis for seeking that office as a separate compartment in the first place? Do either of you know that?

Mr. CARVER. I don't believe that either of us are in a position to respond to you substantively on that, Senator.

Senator LEVIN. Can you get these answers for the record?

Mr. WHITLEY. Yes, sir.

Mr. CARVER. We'll do that.[1]

Senator LEVIN. The Independent Counsel is listed in the 1987 Code of Federal Regulations again as a separate component of the

[1] See p. 178.

Justice Department. Your office has told the subcommittee staff that the 87 Code is not accurate and that the Independent Counsel Offices are not compartmentalized.

So do you know what the status of those offices are?

Mr. WHITLEY. That's another question that we'll have to get back to you on, Senator. I don't know the answer.

Senator LEVIN. You don't know the status? I mean you know from a prosecution point of view what the status is, don't you?

Mr. CARVER. I think it's safe to speak from my understanding that, yes, they are designated as a separate statutory component. I'm not sure of the source of your information.

Senator LEVIN. You're not sure of what?

Mr. CARVER. Of the source of your information, but I'm sure that can be checked and we can have a definite answer.

My understanding is that they are a separate statutory component of the Department of Justice.

Senator LEVIN. And that the CFR then is correct?

Mr. CARVER. That's right.

Senator LEVIN. So that whoever told us they are not compartmentalized is wrong?

Mr. CARVER. I believe that, but I may be wrong.

Senator LEVIN. All right. You'll let us know that for the record, if you would.

I now just want to get to the compartmentalization issues as they affect prosecution under 207(c).

What is the effect of a three-year delay on the publication of a compartment or the omission of a designated senior official from the Federal Register?

Mr. WHITLEY. It's my understanding, and I'll let Mr. Carver elaborate on it, then if it's not in the Code of Federal Regulations that we are not able to proceed to prosecute.

Senator LEVIN. Is that correct, Mr. Carver?

Mr. CARVER. Well, you need to have the correct designation to have a covered official, and there is a procedure that is set out and we would be bound to follow that procedure.

Senator LEVIN. Are you saying that if it is not published for three years in the Code that you can't prosecute?

Mr. CARVER. My question would initially be whether or not there was a proper designation. This is something that hasn't been litigated, and whether our position might be that there was technically an adequate act of designation without the publication is not an issue that I have addressed and it's not an issue that I would want to foreclose taking a position on in the future.

Senator LEVIN. So you're not sure what the answer would be and it would depend on circumstances.

Could it affect prosecution negatively if it weren't published in the Code?

Mr. CARVER. I think the obvious defense would be that there was simply no designation.

Senator LEVIN. And would that complicate prosecution?

Mr. CARVER. That's a necessary step, and by definition that would complicate prosecution, yes, sir.

Senator LEVIN. So the failure to publish in the Federal Register for three years would at a minimum complicate prosecution.

Mr. CARVER. Conceivably. I'm talking obviously, too, in hypothetical terms here.

Senator LEVIN. The regulations permit informational contact. Can you tell us how that would be defined in terms of prosecution, the difference between an informational contact and an improper contact?

Mr. CARVER. Well, there is some guidance in that regard in terms of both the legislative history of the statute and the regulations.

To the extent that you are communicating with an intent to influence and not simply providing information within the strict parameters of the statute, and the statute has some rather direction exceptions that are spelled out, we would take the position that unless there were strict compliance with an exception of that sort that the exception would not be applicable, and that's a relatively standard approach to take when there is an exception like that in the statute.

Senator LEVIN. Is the difference between informational and lobbying activities sometimes fuzzy, blurred or gray?

Mr. CARVER. I have some difficulty with the term you use, "lobbying." I like the terms in the statute, communicate with the intent to influence. I think in any case, regardless of the statute, you will approach a line where you have some ambiguity, and I don't think that is avoidable in any criminal statute or any other law.

But by and large a communication with the intent to influence I think——

Senator LEVIN. How about just a flat out ban, wouldn't that make life simpler in terms of communication?

Mr. CARVER. I think it would definitely make life simpler, but I'm not sure that would be right.

Senator LEVIN. So you support continuing the line in the statute between communication with intent to influence and informational communication?

Mr. CARVER. Well, to the extent that you have an exception in the statute, and to the extent that that exception is complied with strictly, yes.

Senator LEVIN. I'm just talking about the statutory language. You have not found any difficulty in terms of prosecution with that exception being lodged in the statute?

Mr. CARVER. I'm not aware of any case or investigation that has really ever involved that specific issue. You will have questions about whether you have a communication with the intent to influence, and then you will get into a semantical debate I suppose about what really occurred.

What it boils down to in the end is a question of fact.

Senator LEVIN. But my question is are you aware of any problem that has occurred in an investigation or prosecution that has resulted from that exception being in the statute?

Mr. CARVER. No, sir.

Senator LEVIN. How many criminal statutes have regulations interpreting the application of the statute or determining the coverage of the statute through publication in the Federal Register, as does 207(c)?

Mr. WHITLEY. I'm not aware of any.

Senator LEVIN. Would the post-employment lobbying ban make more sense if it included civil sanctions instead of or in addition to criminal sanctions?

Mr. WHITLEY. One of our recommendations in previous years to the Senate Judiciary Committee I believe has been to have some civil sanctions, and in the current S. 237 I believe there is a provision in that bill for injunction authority by any Attorney General. So that's a civil provision. And also to give the people at OGE administrative subpoena authority has been suggested, I believe, and perhaps even in today's prepared testimony by the Department.

Yes, we do think some civil authority would be useful.

Senator LEVIN. And how would that affect the possibility of successful prosecution?

Mr. WHITLEY. I'll let Mr. Carver supplement this answer, but I think what we are looking at is trying to get compliance as a first order of business. There are several levels of conduct that you look at in prosecuting any criminal case. Some of it does not rise to intentional and willful violations of the statute.

The civil remedies allow us to deal with what would be the lesser violations of the statute. So it would be useful to have this as a remedy. As a matter of discussion it would be useful to have this as a remedy as soon as we have an opportunity to explore it further with this subcommittee.

Again, it would be useful because it would allow us to deal with those de minimus cases and may very well set examples for those people who may be contemplating grosser violations of the statute.

Senator LEVIN. Is it your statement here that that would not have a negative effect on the possibility of a successful prosecution?

Mr. WHITLEY. There already is a preliminary process through which OGE looks at a case or a matter before we actually receive it. In other words, we don't know of a violation until one is reported to us, and I think as a preliminary matter they might conduct an investigation and let a person know beforehand or an agency know beforehand of a violation before we would hear of it. So there is that preliminary aspect. So I don't think it would hurt in answer to your question.

I would like to ask Mr. Carver if he has a difference with that?

Mr. CARVER. Not a difference, but I would like to supplement something that was said here. We have the 207(j) administrative alternative to prosecution, but now with no subpoena power.

One of the matters that we have mentioned is having the authority for agencies to compel the production of documents and witnesses which power might or might not encourage greater employment of the administrative sanctions.

Second, with respect to civil sanctions, civil penalties and the injunctive relief provision are the sort of things that can be used in conjunction with a criminal statute.

This statute's history, as I believe the Chairman is aware in terms of enforcement over the years, suggests that that might encourage some action in cases where otherwise there may be none.

With respect to hindering criminal prosecution, I think that that's really a neutral fact, the fact of the availability of a civil sanction should not affect one way or the other what might occur in the criminal context, nor should it necessarily affect what would or would not occur.

And, lastly, the statute now or this scheme, the statutory scheme, calls for punishment at a felony level for conduct which may or may not be perceived by a jury as serious in some cases.

In those situations where it is less serious, perhaps a misdemeanor alternative would provide some encouragement for the employment of criminal sanctions in situations that again might otherwise go unaddressed or be addressed perhaps at the administrative level.

Mr. WHITLEY. We would suggest that the subcommittee consider then a one-year misdemeanor penalty along with the proposed five-year penalty in S. 237.

Senator LEVIN. From the perspective of a prosecutor should we even retain this compartmentalization authority?

Mr. WHITLEY. I think it makes it difficult from a prosecution perspective because of the lines that have to be drawn from my recent analysis of the law.

I defer to Mr. Carver in answering that question.

Mr. CARVER. Whether to retain compartmentalization, it seems to me again depends on fundamental objectives that you set for your statute and what you're trying to accomplish.

You mentioned a number of purposes for this statute. The purposes include attempting to prevent former officials from trading on inside information they have, and others. I think just about any prosecutor in the field and any Assistant U.S. Attorney working on a case would rather have a statute that's straightforward and designates individuals who are covered in rather clear-cut and straightforward language.

But again as to the policy of whether you should have a particular office compartmentalized, I have no opinion on that.

Senator LEVIN. Were you here when we tried to figure out where Mr. Carlucci's position was?

Mr. CARVER. I heard every word, yes, sir.

Senator LEVIN. Do you see any problems that would be raised for prosecuting somebody in that position? We had the OGE who didn't even know where he belonged on that chart. The White House says the Assistant to the President for National Security Affairs is in the White House compartment. OGE sits here and says, oh, no, no, he's a member of the National Security Council, which he isn't. But in any event, OGE places him in the National Security Council compartment.

Now where is the clarity in all this?

Mr. CARVER. To the extent that you may say that we have an initial question of determining coverage, and it might be complex, I think it's clear from what you've said that you would have a complex problem that would have to be answered.

Would that impede prosecution in a case where an offense had occurred and where it could be demonstrated? I think the answer logically is no, because what you're trying to determine at the threshold is whether or not you have coverage. Whether or not that would suggest a defense to an individual that they lacked an awareness of capacity is an entirely different question and that raises some issues that the courts have not spoken to about the requisite awareness of individuals as to their capacity.

For example, it was suggested, I believe, by Mr. Martin that perhaps someone would not realize that they were in a covered position. That could very well be irrelevant.

Senator LEVIN. I'm not talking about that. I'm talking about that chart. I'm talking about where the White House says that the Assistant to the President for National Security Affairs is and that's in the White House compartment.

Now the Assistant to the President for National Security Affairs goes and lobbies the National Security Council two days after he leaves, and some one comes along and says, hey, wait a minute, you can't lobby the National Security Council.

We had the Director of the OGE who told Senator Levin's Subcommittee that you can't do that. He says, what do you mean? The White House says I can do it. The official White House documents say I can do it. It's all been compartmentalized and I'm on the staff of the White House. That a pretty good defense it would seem to me.

Mr. CARVER. Without speaking to the White House in particular, again you ordinarily go to tables of organization and you go to official sources of information and you go to a body of case law, if it exists, to answer these kinds of questions and you determine what that answer is.

You've addressed the point that I was making a moment ago. It very well may be that under the law it makes no difference whether or not the covered person knows of the coverage. It may be that it's simply a matter of whether you have the capacity as a jurisdictional basis to commit the crime. That hasn't been settled in the courts.

Senator LEVIN. That hasn't been what?

Mr. CARVER. That has not been settled in the courts.

Senator LEVIN. Well, what I want to do is give the Justice Department a copy of this letter—you know, I'm an old criminal lawyer, too, and my gosh, this is on White House stationery and the name Frank C. Carlucci, Assistant to the President for NSA appears in the White House office.

If a person can't rely on that when he leaves Government, I don't know what he can rely on.

Shouldn't he be able to rely on that?

Mr. WHITLEY. I have not had an opportunity to see that, Senator.

Senator LEVIN. Well, assuming I'm right. I mean this is the White House letter to me and it places Carlucci in the White House office compartment. The compartmentalization has been approved by the Office of Government Ethics. Shouldn't Carlucci be able to rely on where he's located in that scheme when he leaves the Government?

I'll answer my own question. It's obvious. The answer is yes, he ought to be able to rely on that.

If nothing else, we want to try and tell people what they can do and what they can't do in criminal law and you ought to be able to rely on it.

Now he does rely on it, and he goes and he lobbies the National Security Council two days later. If anybody can tell me how that carries out the purpose of this statute, I would be amazed because to me it just absolutely destroys the purpose of this statute. And that is the result of compartmentalization. It's not the only example like that, by the way. This is just one that jumps out at you, and we're mentioning Carlucci because no one has ever raised a problem about it. He's still there. So it's not a sensitive issue. We are just talking about the office and are using his name because he happens to be sitting there at the moment.

But I mean this current system allows him to go and lobby the National Security Council of which he is an official although not a member. Now that just doesn't make any sense. I don't see how that can make sense to anybody in terms of confidence in government, for the National Security Adviser to the President to go and lobby all the members of the National Security Council the day after he leaves Government, but that's where we're at.

Mr. WHITLEY. Senator, is that what the letter says or is it——

Senator LEVIN. It puts him in the White House office. Assuming that is what the letter says, does it make any sense to you?

Mr. WHITLEY. Assuming that——

Senator LEVIN. Assuming that he is placed in the White House office, "Carlucci, Frank C., Assistant to the President for NSA," and there is only one of them that I know of——

Mr. WHITLEY. Assuming that, it's obvious again that it is of concern that people receive notice as to what they can do post-employment. There is certainly not clarity in certain hypotheticals that you gave us.

Senator LEVIN. Well, these aren't hypotheticals.

Mr. WHITLEY. As to this particular situation, I think, as Mr. Carver has indicated, we would have to defer to OGE and the affected agency to come up with whatever solution they can reach as to whether or not somebody is or is not within a compartment.

Again, in theory, Senator, I'm not disagreeing at all with anything that you're saying.

Senator LEVIN. We will give you a copy of the White House letter and you might as well just address that question of whether or not it would be fair to prosecute a person for relying on that letter and that compartmentalization. Carlucci is in the White House compartment and the compartmentalization has been approved by OGE and has been published in the Federal Register. It's on White House stationery. Now he goes out and he lobbies some other compartment and somebody presumably is going to say, oh, you can't do that, because Dave Martin told some subcommittee once in the Senate that you are also in some other compartment.

Something has got to give and something has to change when that sort of confusion is the result of current law. When that kind of scheme can be approved by the Office of Government Ethics, you've got a problem, and I think you would agree with me.

Would you agree with me that you've got a problem, assuming I'm right in my facts with the White House letter and——

Mr. WHITLEY. Assuming a situation like that, I would be troubled by it and I would think the employee would be as well.

I think certainly the intent of the law is to put that employee on notice as to what potential conflicts might exist. I'm not speaking of this particular situation because I have no knowledge of it.

Senator LEVIN. I understand. But the purpose of the law is also to inspire some confidence in Government as well as to put employees——

Mr. WHITLEY. Absolutely, and I think the large majority, about 99.9 percent of all people that work in Government would applaud this statute and are glad to be subject to it.

Senator LEVIN. My last question on that one chart then is do you think it would inspire confidence in Government if the Assistant to the President for National Security Affairs could, one day after he leaves, go out and lobby the National Security Council? That's my question. Would that inspire confidence in Government and in the purpose of this law?

Mr. WHITLEY. As to a hypothetical situation, I would say probably not.

Senator LEVIN. And if it's not hypothetical, then your "probably not" would appear to the real world. We'll give you the real world letter so you can comment for the record as to whether or not that is indeed the real world.

The last question. Is this chart here, which according to the OGE isn't quite as complicated as it could be because we left off one gate, which I don't doubt for a minute. In fact, there may be a few other gates that belong on there.

I think you've seen this chart.

Mr. WHITLEY. Yes, sir.

Senator LEVIN. We tried to put on one page the various questions that an individual would have to ask himself or herself to determine the extent of the post-employment lobbying ban.

Does this chart, assuming it is accurate, evidence a problem with the statute, since we have an exclusively criminal statute?

Mr. WHITLEY. In my remarks earlier I indicated that I had an opportunity to see this chart as of yesterday. One of your staffers was kind enough to send it to me, and upon examining it and if this is in fact the way things are outlined, yes, it is complicated.

Senator LEVIN. Does it evidence a problem with the statute in terms of criminal prosecution?

Mr. WHITLEY. I'll let Mr. Carver answer this in greater detail, but I would think that one of the concerns we have in enforcing any law is to put on notice potential violators of what the consequences of the violation or consequences of any misconduct might be.

Mr. CARVER. Let me go back to your other point, Senator, with your letter, and that is that a person who had been given notice along the lines that you had indicated and relied on that within an organization under this statute, there is absolutely no question in

my mind but that wherever you went in the United States and in whatever district, under those circumstances would not be held accountable, it's just that simple, under the law if those particular facts were in fact true.

With respect to complicating prosecution, the statute is clearly a complex statute in the minds of most people. So it's a difficult statute in any event. So anything in it that is complicated, and the designation is, is going to in that sense complicate a prosecution.

However, the existence of that particular designation provision, or those designation provisions, would certainly not bar prosecution nor would it necessarily supply an effective defense.

Senator LEVIN. I think it wouldn't bar or be necessary. My question is is it likely that there is going to be some problems in prosecuting——

Mr. CARVER. I think it obvious in terms of making the threshold determination of capacity, that's one other step the prosecutor has to go through. So in that sense it does.

Senator LEVIN. The Justice Department has not taken a position, as I understand it, as to whether we ought to end compartmentalization altogether?

Mr. WHITLEY. No, sir, we have not.

Senator LEVIN. Are you going to be doing that?

Mr. WHITLEY. We would like to take it under advisement and consider it.

Senator LEVIN. Will you let us know say within two weeks whether you're going to be taking a position and, if so, what it is, because there is a bill that has just passed the Judiciary Committee that eliminates compartmentalization, as you know and I know.

Now, frankly, I've just basically gotten to that point myself. I would like to be able to do it if it were possible because I think it might be fairer in an abstract sense in a perfect world.

The trouble is from what I've seen of it, it's just so darn complicated and has led to this kind of a fiasco that I've reached a point where I'm willing to consider at least eliminating compartmentalization altogether.

Now it's important what the Justice Department position is on it. If you have a position, if you would let us know in a couple of weeks, great. If you don't have a position, let us know that you don't and won't be taking a position so at least we will know.

Mr. WHITLEY. If I might, Senator, I personally was not aware of S. 237 until yesterday when I had an opportunity to review it. So I brought this up in the subject of my testimony here today to say that that's one way, and it may be too extreme to deal with this problem.

I would like to have an opportunity to look at it and see if there is an opinion or posture that the Department would take, and we will try to get back——

Senator LEVIN. Is two weeks enough for that?

Mr. WHITLEY. Sir, I really don't know. I would like to say——

Senator LEVIN. Give us a status report then in two weeks. If that is not enough time and you need more time to reach a conclusion, keep us informed because we are going to be working with the Judiciary Committee on this issue, and we would like, if possible, to

have all the input we can receive, including that of the Justice Department. So we would welcome that input.

Let us know, if you would, in a couple of weeks whether or not you've got a position and, if so, when you'll know, et cetera. Would that be all right? Is that fair enough to leave it that way?

Mr. WHITLEY. Of course in large part we have been deferential in our testimony to OGE. So there are other components that we would want to consult with in responding. So there may be a delay in getting a comprehensive response back to you, or we might contact you and say that we have no response.

Senator LEVIN. That's fair.

Mr. WHITLEY. In either event, we would like an opportunity to consider that.

Senator LEVIN. That's fair enough. Just keep us informed as to what your process is so we'll know, if you would.

All right. We thank both of you for coming this morning and for your testimony and patience.

We will stand adjourned and we will keep the record open three days for additional questions. There would be some additional questions also for the Justice Department.

[Whereupon, at 12:30 p.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

TESTIMONY OF
STUART E. EIZENSTAT*

BEFORE

SENATE SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT-COMMITTEE
ON GOVERNMENTAL AFFAIRS
WASHINGTON, D.C.

JUNE 25, 1987

I appreciate the opportunity to appear before the Subcommittee on Oversight of Government Management to discuss an issue which might seem technical on one level, but in fact addresses a very important issue in our conflict of interest laws. That is the issue of compartmentalization of the Executive Office of the President.

I provide this testimony with a considerable body of experience regarding the Executive Office of the President and the White House. I have been in the Executive Office of the President and on the White House Staff under two Administrations, first as a junior White House assistant in the Administration of Lyndon B. Johnson from 1967 - 1968, and then in a senior role as

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* Mr. Eizenstat is a partner in the Washington office of Powell, Goldstein, Frazer & Murphy and an Adjunct Lecturer at the John F. Kennedy School of Government of Harvard University. He was President Jimmy Carter's Chief Domestic Policy Adviser and Executive Director of the White House Domestic Policy Staff from 1977-1981. Mr. Eizenstat expresses his appreciation to Mr. Alan Minsk of Brandeis University for his excellent research and assistance on this testimony.

both Chief Domestic Policy Adviser to President Jimmy Carter and Executive Director of one of the units of the Executive Office of the President, the Domestic Policy Staff (now designated as the Office of Policy Development under President Reagan and, formerly, the Domestic Council under Presidents Nixon and Ford). In addition, I teach a course each year at the John F. Kennedy School of Government at Harvard University which examines the substance and process of presidential decision-making. In this course, we examine decisions made by modern presidents -- both the factors which influence those decisions and the process and organization of those decisions within the Executive Office of the President.

I have just completed service on a special task force chaired by Fred Fielding and Lloyd Cutler, respectively Legal Counsel to President Ronald Reagan and to President Jimmy Carter, which examined, among other things, this very issue of compartmentalization of the Executive Office of the President.

In addition to this background, I also have a particular interest in the topic before this subcommittee since I helped coordinate the Carter Administration's position on tightening the conflict of interest laws, which led to passage of the Ethics in Government Act of 1978, amending 18 U.S.C. 207, restricting post-employment activities of former officials and employees of the Executive Branch.

I will state my conclusion at the outset: the Executive Office of the President should be considered one unit for purposes of the conflict of interest laws of the United States. The current compartmentalization of the Executive Office of the President into nine separate components is inappropriate, illogical, and fails to recognize the continuous interaction between the various units of the Executive Office of the President.

HISTORY

The creation of the Executive Office of the President is a direct and immediate outgrowth of the added responsibilities which the nation has required of their presidents and which they have assumed during the 20th century.

For the first 130 years of the Nation's history, the powers and actions of our presidents were quite limited. The legislative branch of government, the Congress, was the predominant decision-maker in Washington. Presidents had only a few personal aides working around them. They relied on a few key departments, like the Treasury Department, the State Department and the War Department, for the development of Executive Branch decisions. The range of decisions presidents had to make were limited and the need to coordinate those decisions among and between Executive Branch Departments was likewise limited.

President Abraham Lincoln, as a result of the crisis of the Civil War, was one of the first Presidents to take a major activist role in decision-making. He was given several personal military aides who could work solely with him to provide advice and coordinate war policy. Even into early part of the 20th century, we find our Presidents with exceedingly small personal staffs. President Wilson, for example, wrote most of his own speeches and typed many others. So to, President Theodore Roosevelt, an activist and energetic president had a staff of less than two dozen people. The job of the presidency did not require Presidents to be resident in Washington full-time and many spent the summer months entirely away from Washington.

All of this changed during the presidency of Franklin D. Roosevelt, with the twin crises of the Great Depression and the looming World War.

The dislocations caused by the Great Depression were so severe and a need for prompt and far-reaching Presidential action so obvious, the nation looked to the presidency as the institution to do things which were in no way enumerated in the Constitution -- namely to initiate proposals to manage the economy, create growth and jobs, deal with poverty and unemployment, stabilize inflation, provide for the training and relocation of workers, and develop health and security programs for the elderly and disadvantaged. Moreover, (while the

President was the Commander-in-Chief of the Armed Forces and was looked to for military leadership from the first days of the Republic), the responsibilities imposed upon President Roosevelt as a result of the scope and duration of World War II and the vast national resources that had to be mobilized, likewise imposed burdens on the Presidency which it was ill-equipped to handle.

President Franklin Roosevelt appointed the Committee on Administrative Management, chaired by Louis Brownlow, in 1936 to advise him on how to best organize his office to meet the new burdens thrust upon the Presidency.

The Brownlow report stated that "certain changes in law and administrative practice are required to restore the Executive to that position of power with compensating responsibility which is the clear purpose and intent of our Constitutional system." The Brownlow reports summed up what President Roosevelt had felt when he asked Brownlow Committee to provide him advice:

> "The President needs help. His immediate staff assistance is entirely inadequate. He should be given a small number of Executive Assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government...Their function would be, would any matter be presented to the President for action

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affecting any part of the Administration work of the Government, to assist him of attaining quickly and without delay all pertinent information...to guide him into making his responsible decisions."

The Committee recommended that the President be allowed six administrative assistants "to lighten the intolerable personal burden upon him" and also suggested the transfer of the Bureau of Budget from the Treasury Department, where it had been lodged, to a Budget Bureau under the President. These two proposals were the only two of the six recommendations accepted by the Congress at the time.

In 1939 Congress passed the Reorganization Act "to promote the better execution of the laws, the more effective management of the Executive Branch and its agencies and functions, and the expeditious administration of the public position."

The Executive Office of the President which we are discussing today was created by Reorganization Plans Number 1 and 2 in April 1939. The purpose of the Executive Office of the President was to alleviate the workload on the President, and help him delegate certain items to the Departments and Agencies. The eminent political scientist and historian Clinton Rossiter said "the creators of the Executive Office intended to rescue not merely the administration but the Presidency itself from the babel and bedlam of the modern state."

As created by President Roosevelt, the White House Office was to serve the personal and political needs of the President, while the Executive Office of the President was to enhance the institution of the Presidency and enable the President to better manage the Executive Branch of Government.

One modern commentator from the Congressional Research Service noted:

> "As established in 1939, the Executive Office of the President was designed to function as an enclave of presidential staff agencies whose personnel would assist the Chief Executive in the management of the Executive Branch and coordination of public policy administration" (CRS Report by Harold Relyea, "The Executive Office of The President: Some Background Information", April 17, 1978, Page 44).

President Roosevelt's Executive Order 8248 in 1940 established the divisions of the Executive Office of the President into the White House Office, the Bureau of the Budget, the Natural Resources Planning Board (which was later eliminated), the Liaison Office for Personnel Management, and the Office of Government Reports, the precursor of the Office of Emergency Management.

As the responsibilities for the Presidency continue to grow in the post-World War II era, so to did the Executive Office of the President. President Truman established the Council of Economic Advisers, as mandated in the Full Employment Act of 1946, to advise the President on macro-economic policy. As the country became more involved in international affairs and the Cold War began with the Soviet Union, President Truman created the National Security Council in 1947.

Over the years, new units were added. Thus, for example, President Nixon created the Domestic Council to provide the same policy coordination of domestic affairs as the National Security Council in foreign affairs. President Nixon also broadened the responsibilities of the Bureau of the Budget within the Executive Office of the President by creating the Office of Management and Budget to give the Presidency stronger control over the implementation and management of federal policy. The Council for Environmental Quality was added to help advise the President on increasingly important environmental issues, and the Office of Science and Technology Policy was added as technologic issues increasingly cut across public policy decisions in our complex world.

The size of the staff of the Executive Office of the President increased over the years, reaching its apex during the Nixon Administration.

It is long been recognized that the President needed to have substantial discretion in organizing the Executive Office of the President to fit his own needs. Thus, for example, in 1949 the Hoover Commission recommended that the President be allowed to reorganize the Executive Office of the President or transfer functions from one part of it to another.

Over the years, different studies, such as the Heineman Task Force (the President's Task Force on Governmental Reorganization) in the Johnson Administration and the Ash Council during the Nixon years, formally known as the President's Advisory Council on the Executive Organization, called for stronger White House Staff Management "to make agencies more responsive and to aggressively translate the President's policies into action." Both panels suggested that the White House Staff should deal more directly in settling interagency disputes.

In November 1980 the panel of the National Academy of Public Administration, during the transition from the Carter to the Reagan Administration, made several recommendations regarding the Executive Office of the President. The Panel concluded that the White House Staff was part of the Executive Office and the "Institutional Presidency." They said that information relayed to the President was not well coordinated and noted that various executive branch agencies did not work well together. The National Academy of Public Administration concluded that the

capacity to deal with different interests and agencies "implies an Executive Office that is organized to facilitate collaboration with others, not one that simply tries to impose the will of the President and his staff."

The history of the compartmentalization of agencies under the Ethics in Government Acts in 1978 is likewise interesting.[1]

In Title Five of the 1978 Ethics Act, 18 USC 207(e), the Director of the Office of Government Ethics (OGE) is required to designate separate subagencies within a parent department or agency for purposes of limiting the scope of the one year no-contact restriction in the 1978 Act, whenever the Director determines that the subagency exercises functions which are distinct and separate from the remaining functions of the department or agency. The importance of this designation is that former senior level officials are generally allowed to contact employees in the remainder of the agency if there has been a separate designation.

The basis behind the decision of the Director of the OGE to make designations for agencies created by statute and certain non-statutory components of a parent agency has to do with the question of whether or not the functions of the units are

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1 For an excellent summary see GAO "Ethics Regulations: Compartmentalization of Agencies under the Ethics in Government Act", GAO Report 87-25, February 1987.

separable and whether the potential exist for a former employee to use undue influence or take unfair advantage of employees of other units of the same department or agency.

The OGE has decided that it would make separate subagency designations only if requested by a department or agency.

As the Carter Administration was leaving office, a senior official, Jack Watson, rendered an opinion that the Administration did not view the Executive Office of the President as a single agency for purposes of the one year no-contact restriction but rather as multiple agencies. It based this upon the judgment that there were no common functions, common responsibilities, or staff and because the Executive Office of the President as a whole was not subject to laws applied to other agencies such as the Administrative Procedure Act. It was the Administration's view that the Executive Office of the President consisted of separate agencies. The Carter Administration took the position that the following entities within the Executive Office were separate agencies for purposes of 207(c):

- The Office of Management and Budget
- The Office of Science and Technology Policy
- The Council on Environmental Quality
- The Office of Administration
- The Council on Wage and Price Stability

- The Office of the United States Trade Representative
- The National Security Council.

The Carter Administration considered the following to be a single agency within the Executive Office:

- The Vice President's Office
- The White House Office
- The Intelligent Oversight Board
- The Domestic Policy Staff
- The Council of Economic Advisors.

The Administration viewed these as one agency because of the interaction of the staffs with each other on a regular basis in assisting and advising the President and Vice President, while their dealings with the staffs of the other components of the Executive Office were felt to be more limited and more like their dealings with the staffs of other Executive Branch departments and agencies outside the Executive Office.

Interestingly, on March 31, 1981 the Director of OGE informed the Reagan White House that the OGE disagreed with the Carter Administration's interpretation that the Executive Office of the President was not a single agency for purposes of 18 USC 207(c). The OGE concluded at that time that the Executive Office

of the President was "one umbrella agency with changing components or units whose responsibility themselves change from time to time." The OGE Director recommended that the Reagan Administration review the matter starting with the premise that the Executive Office of the President was one single agency.

The Legal Counsel to President Reagan, on December 6, 1982, requested that the Acting Director of the OGE designate even more units within the Executive Office as separate units for purposes of the one year no-contact bar, actually broadening the designations suggested by the Carter Administration. The Reagan Administration added the Office of the Vice President and the White House Office of Policy Development (the Reagan equivalent of the Carter Domestic Policy Staff) to the separate designations made by the Carter Administration.

On March 7, 1983, the Acting Director of OGE reversed the position taken with regard to the more limited Carter designations and agreed "without any substantiating explanation" (GAO report, page 15) that each of the nine separately designated agencies within the Executive Office of the President were in fact distinct and separate from the rest of the Executive Office of the President.

The practical effect of this is that former senior employees of the Executive Office of the President can contact employees

from these nine agencies within a year after leaving government service (the former heads of each of the nine subagencies, however, cannot contact anyone in the Executive Office during that one year period.)

RECOMMENDATIONS

I must disagree both with the judgement of some in my Administration in 1981 regarding the separate designations, those of the Reagan Administration in 1982, and OGE's agreement in 1983 to designate the nine requested subdivisions of the Executive Office of the President as separate statutory subagencies under 18 USC 207.

As the person principally responsible for coordinating domestic policy of the Carter Administration, I can tell this Subcommittee that the nine units interacted on a regular and persistent basis and cannot be considered separate subagencies.

Virtually every issue that is worthy of coming to the Oval Office for the President's decision comes to him because it involves conflict among and between various of his Cabinet Departments which cannot be resolved short the President. Presidential issues by their very nature cut across the jurisdictions of various Departments.

Every issue coming to the Oval Office involves the interests

of multiple departments and agencies outside the Executive Office of the President each with there own turf-driven and constituency driven view point. Decision-making within the Executive Branch is therefore highly balkanized.

In order to provide the President with a rational decision process given the cacophony of different views presented to him by his Executive Branch Departments, the White House and Executive Office of the President must serve an integrative role. Yet the integration of policy at the White House level of the disparate views of the departments can only work effectively if the components of the Executive Office of the President work with each other regularly and smoothly.

Thus, for example, the Carter Administration's decision about whether to support an increase in the minimum wage in 1977, involved almost every one of the Executive Branch Departments, but particularly the Departments of Treasury, Commerce and Labor. In turn, to coordinate the President's decision, the Domestic Policy Staff (now the Office of Policy Development), the Office of Management and Budget, and the Council of Economic Advisers within the Executive Office of the President were intimately involved.

In developing trade policy and in making decisions on individual trade complaints, dozens of which came to the

President during our four years in office, the United States Trade Representative, the staff of the National Security Council, The Council of Economic Advisers, the Office of Management and Budget, the Vice President's Office, the Domestic Policy Staff, and frequently members of the White House Office such as the Congressional Relations Office were regularly involved.

On major energy and environmental decisions which involved Executive Branch departments like the Departments of Interior and Energy, the Department of Transportation, and the Environmental Protection Agency, a variety of Executive Office units were necessary from the Office of Science and Technology Policy to the Council for Environmental Quality, from the Office of Management and Budget and the Council of Economic Advisers to the Domestic Policy Staff.

The fact is that I made certain that on every significant domestic issue that the budget aspects were brought to the President's attention (thereby involving the Office of Management and Budget in every domestic decision), that its economic consequences were considered (thereby assuring participation of the Council of Economic Advisors), that the political and Congressional consequences were factored in (thereby involving the White House Office), that the Vice President's staff always had their opportunity for input (thereby involving the Office of the Vice President), and that other components of the Executive Office were involved as needed -- and they frequently were.

Moreover, in my experience more and more issues had both international and domestic implications. Thus, the President could not make an informed and wise decision on trade policy, on export policy, on micro-economic policy, on specific issues like the response to the Iranian hostage crisis (which involved international decisions as well as domestic actions such as freezing Iranian assets) or the Afghan invasion (which involved both international and domestic decisions, including the grain embargo) without involving both the foreign and domestic sides of the White House and Executive Office. It was essential that the staff of the National Security Council be involved with domestic units, such as the Domestic Policy Staff, Council of Economic Advisers, and the Office of Management and Budget.

In addition, it is important for the Subcommittee to understand the way in which general macro-economic policy is made in Administrations. The Nixon, Ford, Carter and Reagan Administrations all created a unit outside the Executive Office to work with the Council of Economic Advisers, the Domestic Policy Staff and the Office of Management and Budget, variously called, the Economic Policy Board, the Economic Policy Group, and the Economic Policy Council. This group is responsible for both long term and short term macro-economic decisions in each presidency. The group is traditionally chaired by the Secretary of the Treasury. From time to time, it will include a variety

of executive branch departments as are necessary for its particular decisions. But the major actors beside the Treasury are the Office of Management and Budget, Council of Economic Advisors, National Security Council, and the Domestic Policy Staff (Office of Policy Development) and, on frequent occasions the United States Trade Representative. In our administration, the Office of the Vice President, through the Vice President himself or one of his designees, sat in on many of the meetings. Again, because so many macro-economic decisions have both domestic and international effects, it is necessary for the international and domestic sides of the White House to be represented, as well as the budget office and the President's economic advisors (the Council of Economic Advisers). In our Administration, this economic policy group met at least once a week.

The facts are that in every modern Presidency, the nine agencies designated as separate and distinct in fact work in close, intimate and regular contact.

Indeed, a domestic adviser who did not regularly bring in representatives of these units for significant decisions (although obviously all were not involved in each decision) simply would not be doing his job.

There is simply no question but that any senior official working in one would have a disproportionate impact on those officials remaining in other components.

In fact, to indicate that the Office of the Vice President and the White House Office are separate is to deny the kind of regular and extensive coordination between the two that in fact has existed under both the Reagan and Carter Admninistrations and that should serve as a model for the relationship between the President and Vice President. It is important that the two senior officials in the executive branch have a good personal working relationship. But it is also critical that in an institutional way the two offices, the President's staff and the Vice President's staff, have regular working relationships with each other. I normally invited Vice President Mondale's staff to participate in inter-governmental or inter-White House meetings.

The fact that particular Executive Office entities may have been created by separate statutes has no relevance to their actual working relationship. Nor does it matter that units within the Executive Office may not be covered by some other statute like the Privacy Act.

To consider these nine components of the Executive Office of the President to be separate subagencies likewise flies in the face of the history of the Executive Office which I have

described. Again, it should be emphasized that the original -- and continuing -- purpose of the Executive Office of the President is to serve as an integrating mechanism for the President to organize policy within the Executive Branch. In order to perform this function, the Executive Office itself must be integrated and must perform as a cohesive unit, not separate and distinct subagencies. If the nine units designated as separate and distinct by the Office of Government Ethics in fact functioned that way, then the Executive Office of the President would ill-serve the President of the United States. Issues do not come to the President in neat compartmentalized vessels, but rather cut across a number of jurisdictions and disciplines. In order for the President to be best served, he must understand issues from a variety of perspectives. For example, a President must review important environmental actions, like cotton dust regulations or new source performance standards for coal fired power plants, or amendments to the Clean Air and Clean Water Act, not only from an environmental perspective, but also from a science and technology perspective, from a macro-economic and micro-economic perspective, and from a broad domestic policy perspective. Indeed, some environmental issues, like acid rain, could also involve international implications (and thus the National Security Council).

For these reason, I urge this Subcommittee and the full Committee by statute to treat the entire Executive Office as one agency so that for one year no senior level person within the Executive Office of the President can meet with employees of any component unit within the Executive Office.

I do not wish to involve myself in legal judgment in the Michael Deaver case. But it is impossible to testify in this matter without expressing the opinion that a person at his level, Deputy Chief of Staff and Assistant to the President for over four years, would quite obviously have a disproportionate impact on decisions by any unit within the Executive Office of the President, such as the Office of Management and Budget with whose representatives he allegedly met. Without commenting on the legality of that contact, suffice it to say that this Subcommittee should not permit people similarly situated to do this without it being a violation in the future of the conflict of interest laws of this country.

My recommendation with respect to eliminating the compartmentalization of the Executive Office of the President is confirmed by the recent decision of the Task Force on Ethics and Government Legislation of the Kennedy School of Government at Harvard, co-chaired by Messrs. Fielding and Cutler. The Task Force found as follows:

"OGE had previously concluded that the EOP was a single agency. Our subcommittee has concluded that a bright line should be drawn the precludes EOP employees compensated at or above a rate equivalent to executive level II under 5 U.S.C. 5313 from contacting for one year any employee of the EOP. This means that for the highest presidential assistants, including the Chief of Staff, the Director of the Office of Management and Budget, the US Trade Representative, the Counsel to the President --the cooling off period should apply to contacts with all of the EOP. Identifying separate and distinct units may be appropriate for lower level officials, but the power and influence of the most senior presidential assistants extends throughout the EOP. The Executive level selected for unitary treatment coincide with those covered by the Independent Counsel provisions of the Ethics and Government Act, 28 U.S.C. 591 (b)(3) as this reflects the best congressional consensus on which officials are close to the President. The report of the Independent Counsel provision indicates

> that in 1984, 36 authorized EOP positions were at this level, of which 23 were filled...the majority of our subcommittee feel that Congress should amend the Ethics Act to codify this recommendation."

Thus, the criminal sanctions in 18 U.S.C. 207 (c) should apply to all of those covered by 18 U.S.C.207(d)(1)(A), (B), (C).

There is a question of the sufficiency of the current legal definitions of "senior" officials in 18 U.S.C. 207(d). As a practical matter "significant decision making and supervisory responsibility" rarely extends into the ranks of White House officials below the executive level pay scale. Because of the "coziness" and intimacy of the White House staff, for appearance sake, the Subcommittee may wish to consider extending the one year bar to lower level White House employees. However, from a purely practical standpoint, it is unlikely that such lower level employees would in fact have a undue influence on decision making by any component within the Executive Office of the President.

There is also a question of whether senior officials of the Executive Office of the President have such a major role over appointments with regard to other governmental units that the one year bar should extend to them, not only for their own agency, but likewise throughout the government. I think this is

unnecessary. While some senior officials, particularly those in the personnel office on the Chief-of-Staff's office do have such wide ranging roles, most senior officials in the White House do not have such a dominant role over the hundreds of appointments made by the President that they should be barred for a year from any contact through the entire government.

The post-employment conflict of interest laws are designed to balance on the one hand the interests of society in honest government through the appearance and reality of an absense of conflicts of interest and the avoidance of undue reward for government service, with on the other hand, fairness to the former government employees and the interests of government in being able to continue to recruit top notch people. We must be sure that we do not upset this delicate balance by injudicious amendments which would discourage government service.

I have other views on possible tightening of post employment laws, for example, a longer "cooling off" period for representation of foreign governments. I have presented these views in 1986 in testimony before the House Subcommittee on Administrative Law and Government Relations of the Judiciary Committee and will be glad to furnish a copy if that is desired.

United States General Accounting Office

GAO Testimony

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Agency Compartmentalizations and Senior Employee Designations Under the Ethics in Government Act

Statement of
Rosslyn S. Kleeman, Senior Associate Director
General Government Division

Before the
Subcommittee on Oversight of Government
Management
Governmental Affairs Committee
United States Senate

GAO/T-GGD-87-21

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss federal agency compartmentalization and senior employee designation under the Ethics in Government Act of 1978 (Public Law 95-521). In requesting our testimony, you noted that we recently issued a report on the Compartmentalization of Agencies Under the Ethics in Government Act (GAO/GGD-87-25, February 11, 1987). This report responded to Representative Gerry Sikorski's request that we describe (1) the basis and administration of regulations which limit the application of certain postemployment conflict of interest restrictions to designated components of agencies and departments and (2) the application of the regulations to the Executive Office of the President (EOP). Today, I will discuss that report and the other issues in which you expressed interest.

Let me first briefly describe what compartmentalization is. Under the Ethics in Government Act, former senior-level employees are prohibited from contacting their former agencies on particular matters either before the agency or in which the agency has a direct and substantial interest for 1 year after their employment ceases (18 U.S.C.207[c]). Compartmentalization is the process by which agencies are divided into designated subunits for application of the 1-year no-contact restriction.

In passing this legislation, Congress stated its intention that the 1-year no-contact restriction should not apply agencywide to former officials who worked in wholly distinct and separate bureaus of an agency. Thus, the act, together with its 1979 amendment, allow the Director of the Office of Government Ethics (OGE) to designate statutory and nonstatutory subagencies or bureaus as separate components for purposes of the 1-year no-contact restriction. (Generally, a statutory subagency or bureau is created by statute; nonstatutory subagencies or bureaus are created administratively.) The act also authorizes the OGE Director to designate certain positions as "senior-level" positions subject to the no-contact restrictions if they involve significant decisionmaking or supervisory responsibility, even though their salary grades are below the level automatically considered to be held by senior employees.[1]

STATUTORY/NONSTATUTORY DIFFERENCES

You asked us to address the different ways in which the no-contact restriction is applied in the compartmentalization of statutory and nonstatutory agencies. The regulations state that, notwithstanding the designation of a statutory subagency or

[1]This level is defined in 18 U.S.C. 207(d)(1)(A) and (B) as "at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority; or on active duty as a commissioned officer of a uniformed service assigned to pay grade of 0-9 or above as described in section 201 of title 37, United States Code."

bureau, the former head of the subagency or bureau is prohibited from contacting officials of the parent department or agency. However, former employees of the subagency or bureau who are automatically considered senior employees and who are not heads of subagencies are permitted to make such contacts.

In designations of nonstatutory subagencies and bureaus, though, the prohibitions are reversed. There, the regulations state that former heads of subagencies and bureaus and others who have been designated as senior employees by the Director of OGE are permitted to contact the parent department or agency. However, senior officials are not permitted to contact the parent department or agency if they are automatically considered senior employees because of their pay or grade level.

OGE officials told us that this difference in the coverage of the statutory and nonstatutory designations results from an anomaly in the wording of the two statutory provisions authorizing those designations. According to 18 U.S.C. 207(e), statutory designations are to be made "(f)or the purposes of subsection (c)," thereby relating such designations to all officials covered by the 1-year no-contact restriction. Nonstatutory designations under 18 U.S.C. 207(d)(1)(c), however, are to be made "(a)s to persons in positions designated under this subparagraph," which technically applies only to senior employees designated by OGE, not to those high-level officials who are automatically covered

because of their executive rate of pay or uniformed service grade. The coverage of the statutory and nonstatutory designations would have been the same had the word "subsection" been used instead of "subparagraph." OGE officials said that they notified congressional staff of the difference in the coverage of the provisions but no action was taken.

SENIOR EMPLOYEE DESIGNATION

You also asked us to address the accuracy and timeliness of the senior employee designation process. In that process, agencies request OGE to designate certain of their positions as "senior," and therefore covered by the 1-year no-contact restriction. Two assignments in the last 3 years have addressed this issue directly or indirectly. In April 1984, we reported that the Ethics in Government Act provided no criteria to determine which positions below the specified grade levels have "significant decision-making or supervisory responsibility" (Designation of Senior Employees Subject to Post-employment Restrictions Under the Ethics in Government Act, GAO/GGD-84-62, April 26, 1984). OGE established their own designation criteria through regulations which state that

"classes of positions which may be considered for exemption are those in which decision-making responsibility does not regularly extend to major policy issues within the agency or in which supervisory responsibility extends to less than all of a directorate, bureau or department which has major policy or operational responsibility."

Although the discretion that OGE and the agencies exercise in the designation process may have resulted in some inconsistencies, we concluded that the process conformed to the intent of the Ethics in Government Act. We also did not believe that more precise governmentwide criteria could be developed because of the variety of agency missions, structures, and traditions across the government.

In a review we conducted last year of a former Deputy Assistant Secretary of Commerce's compliance with ethics laws, we found that his position had been dropped from the OGE listing of senior employee positions because of what Commerce officials described as an "administrative error" on their part. As a result, the official was not covered by the 1-year no-contact restriction. However, even if he had been designated as a senior employee, we did not believe that he would have violated this section of the law. We presented our findings in testimony before the House

Government Operations Committee's Subcommittee on Commerce, Consumer and Monetary Affairs on July 31, 1986.

ADMINISTRATION OF THE
NO-CONTACT RESTRICTION

The first part of our Compartmentalization report analyzed OGE's administration of the no-contact restriction. In brief, we found that OGE (1) relied on the agencies to request designation of components, (2) did not document how they reviewed agency requests for compartmentalization designation, and (3) published inaccurate lists of designations in the Federal Register.

Reliance on Agency Requests
for Compartmentalization

Although the statutes (18 U.S.C. 207[c] and 207[d][1][C]) allow the OGE Director to make compartmentalization decisions unilaterally, OGE decided shortly after passage of the Ethics Act that it would designate separate subagencies and bureaus only at the request of departments and agencies. Some departments and agencies have requested such designations; many have not. As a result, some large agencies, such as the Department of Agriculture, which has over 100,000 employees, have not been compartmentalized. Meanwhile, some small agencies, such as the National Credit Union Administration, have had units with as few

as four full-time equivalent employees designated as separate agencies. Thus, a senior-level employee who leaves the Department of Agriculture may not contact any of the over 100,000 employees in that department but a senior-level employee who leaves the National Credit Union Administration's Central Liquidity Facility is prohibited only from contacting the other employees in that Facility.

Undocumented Review of
Designation Requests

OGE officials told us their reviews of agency requests for compartmentalization designation depend on the sufficiency of supporting materials provided. We could not confirm this because our review of OGE records on subagency designations indicated that the process was largely undocumented. None of the files indicated the basis on which the designations were approved. Some of the files contained only the agency letters requesting designations and some had only the request letters and the approval letters. No documentation of any kind was available for other designations. OGE officials said they did not know whether the missing documentation had been lost or if it ever existed.

Some Errors in Published Agency Designations

We also found that the published lists of subagency designations contained errors. For example, five entities designated as subagencies no longer existed. Other entities were misnamed or designated under the wrong department and some approved designations were never published. Although not a specific objective of our work, we found no indication that these errors have affected enforcement of or compliance with the postemployment prohibitions in 18 U.S.C. 207(c). Nevertheless, the errors indicate that the required review and updating of agency designations were not being properly conducted by either the agencies or the OGE Director or that the OGE Director was not fulfilling his responsibility to publish those designations accurately. OGE officials said that all of the errors would be corrected when the 1987 designations are published, and that they would periodically review the published designations to ensure that they are accurate and current.

COMPARTMENTALIZATION OF THE EXECUTIVE OFFICE OF THE PRESIDENT

We also described the process by which the Executive Office of the President was compartmentalized into nine separate entities in our report. The process began on January 16, 1981, when an

Assistant to the President in the Carter Administration notified the OGE Director at that time that the Administration believed that OGE subagency designations for EOP would be unnecessary. He explained that the Administration considered EOP to be several separate agencies, akin to independent agencies, because certain components, such as the Office of Management and Budget, had been separately created by statute and were each covered by laws, such as the Administrative Procedure Act, the Privacy Act, and the Freedom of Information Act, which generally apply to agencies. He also expressed the Administration's view that other EOP components, such as the White House Office and the Office of the Vice President, were too functionally intertwined to be considered separate agencies and that they should collectively be treated as a single agency for purposes of the 1-year no-contact restriction.

On March 31, 1981, the Director of OGE notified the White House Chief of Staff in the Reagan Administration of OGE's conclusion that the EOP constituted one "umbrella agency," composed of units whose responsibilities changed from time to time, rather than a group of separate agencies. The Director said the fact that a given EOP entity was created by statute was of "no particular relevance one way or the other" in determining whether the entity constituted a separate agency for purposes of 18 U.S.C. 207(c), and that the coverage of an entity by statutes such as the Administrative Procedure Act, the Privacy Act, or the Freedom of

Information Act also would be "of no particular significance." Characterizing the EOP as a "single agency not yet broken out into component parts," OGE invited the Chief of Staff to request statutory compartmentalization.

On December 6, 1982, the Counsel to the President requested that the new Acting Director of OGE designate 9 entities of the EOP as separate and distinct units for purposes of the 1-year no-contact restriction:

--Office of Management and Budget
--Council of Economic Advisers
--National Security Council
--United States Trade Representative
--Council for Environmental Quality
--Office of Science and Technology Policy
--Office of Administration
--White House Office and the Office of Policy Development
--Office of the Vice President

The Counsel to the President requested statutory compartmentalization based on criteria similar to that which the White House had presented OGE in 1981 in support of the argument that EOP components were already separate agencies for purposes of applying 18 U.S.C. 207(c). Specifically, the Counsel to the President argued that compartmentalization should be granted

because each of the nine units had distinct statutory responsibilities and was considered an "agency" under other statutes such as the Administrative Procedure Act, the Privacy Act, and the Freedom of Information Act. The Counsel also enclosed with his request descriptions of each of the units within EOP.

By a letter dated March 7, 1983, the Acting Director of OGE notified the Counsel to the President that the nine requested subdivisions of the EOP met the requirements for designation as statutory subagencies under 18 U.S.C. 207(e). OGE stated its conclusion that each of the EOP units exercised functions which were distinct and separate from the rest of EOP, as required for statutory compartmentalization under 18 U.S.C. 207(e). However, OGE offered no explanation for its decision.

In the absence of any explanatory analysis by OGE, we concluded in our report that the descriptions of some of the nine enitites within EOP provided by the Counsel to the President did not themselves appear to establish conclusively that the EOP units exercise functions that are distinct and separate from one another. For example, the Counsel to the President described the Office of Administration as being authorized "to provide administrative support services to all units within the EOP except those services which are in direct support of the President." This description did not indicate how the Office of

Administration can be functionally distinct and separate from all units within EOP while providing support services to those units. Also, the Counsel to the President's description of the National Security Council did not explain how that body is separate from the Office of the Vice President, since the Vice President is described as being a member of the National Security Council.

At the time our report was issued in February 1987, the OGE Director said he did not know why his predecessor had approved the EOP designation. He said OGE was reexamining the designation because of public concerns raised as a result of former Deputy Chief of Staff and Assistant to the President Michael K. Deaver's contacts with the Director of the Office of Management and Budget within 1 year of Mr. Deaver's leaving the White House Office. Subsequently, OGE concluded that the EOP designations were proper based solely on the description of functions found in organic legislation for each of the components.

However, the statutes authorizing certain EOP components, such as the White House Office and the Office of the Vice President, simply authorize the appointment of employees and do not contain any description of the functions or responsibilities they will be performing (3 U.S.C. 105 and 106). Also, OGE pointed out in its 1981 letter to the Counsel for the President that the functions and responsibilities of EOP units do not remain static but change

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from time to time. Accordingly, while we understand that the Director of OGE is vested with the responsibility for determining whether components of an agency exercise distinct and separate functions, we question whether a meaningful determination of the separability of functions exercised by EOP components can be made solely on the basis of a review of underlying statutory authorities.

That concludes my prepared statement, Mr. Chairman. I would be glad to answer any questions you might have.

STATEMENT OF

DAVID H. MARTIN
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE
THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
OF
THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON
COMPARTMENTALIZATIONS AUTHORIZED BY THE
OFFICE OF GOVERNMENT ETHICS (OGE)
UNDER 18 U.S.C. §207(d)(1)(C) AND 18 U.S.C. §207(e)
AND
RELATED POST-EMPLOYMENT ISSUES

JUNE 25, 1987

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate the opportunity to appear before this Subcommittee to present the views of the Office of Government Ethics (OGE) on post-employment issues related to 18 U.S.C. §207(d)(1)(C) and 18 U.S.C. §207(e). Examination of the issues surrounding these two statutory provisions is both timely and appropriate as a follow-up on earlier testimony presented to this Subcommittee by OGE at the 1983 oversight and reauthorization hearings.

Section 207(c) of title 18 U.S.C. prohibits a former government employee, within one year of leaving government service, from knowingly representing anyone other than the United States with the intent to influence his former department or agency in connection with any particular matter which is pending before such department or agency or in which the department or agency has a direct and substantial interest. Pursuant to §207(d), the one year ban of §207(c) applies only to the employees specified in §207(d), as described below.

Section 207(b)(ii) provides that for two years after leaving government employment, a former government employee may not assist in the representation of another person by personal presence at an appearance before the government on any particular matter in which he or she could not act as the person's actual representative because of his or her substantial personal participation in the matter while in government. By its own terms, §207(b)(ii) applies only to employees specified in §207(d). The employees specified in §207(d) have been designated, by regulation, as "senior employees." See 5 C.F.R. §737.3(a)(6).

Subsection (1)(A) of §207(d) includes former employees who occupied a position in the executive branch of government for which the rate of pay is fixed according to subchapter 11 of chapter 53 of title 5 U.S.C. (Executive Levels I through V) and those who were employed at a comparable or greater rate of pay under other authority. Subsection (1)(B) includes active duty commissioned officers of a uniformed service assigned to a pay grade of O-9 or above. Section 207(d)(1)(C) covers, in addition, positions which involve significant decision-making or supervisory responsbility, as designated by the Director, Office of Government Ethics, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS-17 of the general schedule, or which are

established within the Senior Executive Service (SES) pursuant to the Civil Service Reform Act of 1978, or which are positions of active duty commissioned officers of the uniformed services assigned to a pay grade of 0-7 or 0-8. The designations required by §207(d)(1)(C) are to be made by the Office of Government Ethics in consultation with the agency or department concerned and must be reviewed on an annual basis.

Standards and procedures to be employed by affected agencies in designating employees who meet the requirements for designation under the Act are found at 5 C.F.R. Part 737.25(b)(1). These guidelines suggest that a position should be designated under §207(d)(1)(C) if it is one in which decision-making responsibility extends regularly to major policy issues within an agency, or if it is one in which supervisory responsibility extends to all of a directorate, bureau, or department which has major policy or operational responsibility.

Section 207(e) provides that when the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, he shall designate such agency or bureau as a separate agency or bureau for purposes of §207(c). Designations made pursuant to §207(e) do not apply to former heads of designated bureaus or agencies or to former officers and employees of the department or agency whose official responsibilities included supervision of the agency or bureau, and thus the prohibitions of §207(c) apply to them for the entire parent agency or department. Section 207(d)(1)(C) provides, in addition, that the Director may limit the restrictions of §207(c) to permit a former officer or employee who served in a separate non-statutory agency or bureau within a department or agency to make

appearances before an unrelated agency or bureau within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage. The limitations authorized by §207(d)(1)(C) are applicable only to employees designated pursuant to that subsection.

We believe that the Office of Government Ethics should retain the authority to designate separate statutory agencies pursuant to 18 U.S.C. 207(c). That authority was established because it was understood that it would serve no purpose, and indeed be unfair, to apply 207(c) with respect to a former employee's contacts with an agency whose functions were distinct and separate from those exercised by the particular agency in which the former employee had served.

The non-statutory designations permitted by 18 U.S.C. 207(d) (1) (C), however, have proven more difficult to administer. The standards to be applied are less clear, and the unique wording of 207(d) (1) (C) has created several difficult interpretive problems for the Office of Government Ethics. For example, a determination made under 18 U.S.C. 207(e) does not benefit a former head of the separate statutory agency or bureau, but it does operate to the benefit of other employees at the executive level. A determination of non-statutory separability under 18 U.S.C. 207 (d) (1) (C), on the other hand, does inure to the benefit of the head of the separate component, if he is a senior employee designated by the Director. However, because of the way the statute is worded, the determination is not beneficial to a person, including the head of a separate component, in a position at the executive level. Literal application of the statue thus can have irrational and perhaps inequitable consequences.

As we pointed out in earlier correspondence to the Committee, we agree that the Director has the authority to conduct an investigation to determine whether the functions of separate statutory or non-statutory components are actually separate. However, it is not clear what would be gained from such an investigation. First, the determination on the separability of functions should not depend upon the interactions that occur as a result of the unique personalities at a given agency at a given time. Second, it would require an extensive staff, which OGE lacks, to conduct such investigations at each executive branch agency. Third, it is unclear what could be observed at an executive agency that would actually supplement the written authority. As pointed out by Senator Ribicoff at the time of passage of 18 U.S.C. §207(d)(1)(C):

> It should be noted that some 9,000 Federal supergrade employees will be eligible for possible designations under this language, and that task could easily become impossible, if OGE had to distinguish between various offices, sections, and subdivisions of the various departments and agencies. Therefore, this designation provision is available only for the most significant agencies or bureaus within departments or agencies.

We believe that executive branch agencies and departments are in the best position to initiate requests which address the significance of various bureaus and agencies within a department.

The statutory language sets out the following test for the Director to apply in making a determination under 18 U.S.C. §207(e): whether the agency proposed for designation is a separate statutory agency or bureau within a department or agency which

exercises functions that are distinct and separate from the remaining functions of that department or agency. There are two elements to the test: (1) that there is statutory authority for the component agency; and (2) that the component agency exercises functions that are separate from the other functions of the agency. OGE has consistently recognized as sufficient statutory authority any of the following: a statute, an Executive Order, a Reorganization Plan, or a combination of these authorities. The non-statutory determinations authorized by §207(d)(1)(C) are intended to provide a similar recognition of separability where the subordinate agency or bureau was administratively created on the basis of distinct subject matter jurisdiction, and upon a determination by the Director that no undue influence or advantage will result to employees serving in the subunits.

We also recommend that you consider eliminating the discretionary "senior employee" designations under §207(d)(1)(C). As previously reported to the Committee, OGE and the individual agencies have found the designation process extremely difficult to administer. The designation process requires an individual explanation of how each senior official fits in the organization's chain of command. This has proven to be extremely difficult in light of frequent agency reorganizations, changes in administration, reductions in force, and other changes in personnel.

Our experience with the annual designation process raises the following areas of concern:

A. Timeliness of Designations - The designation process described in 18 U.S.C. 207 (d) (1) (C) is a complicated one, requiring analysis of each individual position "which involves significant decision-making or supervisory responsibility," and which has a basic rate of pay equal to or greater than the GS-17 level, or which is an SES position, or (in the case of active duty commissioned officers of the uniformed services) which is at pay level 0-7 or 0-8.

Obviously, OGE cannot conduct this analysis without help from the agencies themselves, and to this end the statute provides that the Office shall make its designations "in consultation with the agency or department." In turn, OGE has endeavored to assist agencies in making these determinations by providing all federal agencies regulations, explanatory memoranda, and annual salary schedule updates. In addition, OGE has, on an annual basis, provided each agency with a schedule of designated and exempt positions for the previous year. We have also endeavored to assist agencies by affirmatively requesting position descriptions and other information necessary to evaluate proposed designations, making telephone inquiries where necessary in order to expedite the process.

Nonetheless, the complexity of the process has hindered prompt agency compliance. Based upon the information provided to OGE by various agencies, it is apparent that the present system requires agencies to devote significant resources and personnel to preparing the information required by 207 (d) (1). As a result, the information necessary to make these designations has often been slow in coming. In addition, because of the volume of information to be analyzed, OGE's annual designations have also been delayed.

B. Uniformity of Designations — A cursory review of the senior employee designations published by the Office of Government Ethics reveals that similarly described positions in different agencies often have not been given comparable treatment. However, the variance in OGE's designation of positions is simply reflective of the fact that there is considerable variance among agencies and departments as to the inherent authority of similarly described positions. Position title is not determinative for purposes of senior employee designation; rather, policy implementation and significant decision-making or supervisory responsibility are the key factors. OGE considers the agency recommendation, the grade level of the position, and the potential for abuse, as the most important criteria for designation. In the case of regional director or manager positions, the relative size and importance of the regional offices must also be considered.

C. Precision of Designations — — Initially, we expected that agencies would be reluctant to have OGE designate particular positions pursuant to 207 (d) (1) (C). Indeed, because OGE expected that this reluctance would be a major problem in consultations with the various departments and agencies, we provided early guidance to the effect that failure to respond to requests for information could result in the automatic designation of a position by OGE. Our experience has been, however, that in many instances quite the opposite problem has arisen: because of uncertainty as to the appropriate standard, agencies have often recommended the designation of every eligible position. This is almost certainly due to the fact that the standard in 207 (d) (1) (C) — that a position must involve "significant decision-making or supervisory responsibility" — is susceptible to many interpretations in many contexts. Without a bright-line test, agencies have erred on the side of caution. The result has been that in some cases decisions have been arbitrary. It is our view, therefore, that if the Senior Designation Process is to be continued, its implementation and operation should be made automatic at a certain grade and/or pay level regardless of the supervisory or policy-making aspects of the position.

With regard to applying the statutory tests of 18 U.S.C. §207(e) to the separate statutory agencies within the Executive Office of the President, as we reported to you in February, the Office's designations were made in good faith with considerable effort directed to the analysis. We note further that the designations have no application to the former heads of the agencies -- for these persons, the one-year ban governs all contacts with any agency in the Executive Office of the President. Similarly, former officers and employees of agencies within the Executive Office of the President whose official responsibilities included supervision of any one agency are unaffected by compartmental designations within the Executive Office of the President. Finally, we note that the distinctions we have drawn between statutory agencies with the Executive Office of the President, such as the Council of Economic Advisers and the United States Trade Representative, are comparable to the distinctions we have made among the separate components of Cabinet departments such as Treasury (which includes, among others, IRS, Customs and the Secret Service). The present statutory language treats all Executive branch agencies according to common principles, and we have applied these principles uniformly. Moreover, because it is our view that any statutory revision should simplify rather than complicate the process of designation under 207 (e), we recommend that the principle of uniformity throughout the Executive branch be maintained.

I would be pleased to answer your questions.

STATEMENT

OF

JOE D. WHITLEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

CONCERNING

COMPARTMENTALIZATIONS AUTHORIZED BY THE
OFFICE OF GOVERNMENT ETHICS
UNDER 18 U.S.C. SECTION 207 (d) (1) (c)
AND
18 U.S.C. SECTION 207 (e)
AND
RELATED POST-EMPLOYMENT ISSUES

ON

JUNE 25, 1987

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the comments of the Department of Justice about compartmentalizations authorized by the Office of Government Ethics under 18 U.S.C. §207(d)(1)(C) and 18 U.S.C. §207(e) and related post-employment issues.

An Overview of the Prohibitions Contained in 18 U.S.C. §207 Affecting Only Public Officials Employed as Specified in 18 U.S.C. §207(d)

Certain senior officials of the Executive Branch, independent agencies and the District of Columbia are subject not only to the prohibitions set forth in 18 U.S.C. §§207(a), 207(b)(i), but also to additional prohibitions set forth in 18 U.S.C. §§207(b)(ii) and 207(c).

A. 18 U.S.C. §207(b)(ii)

Subsection 207(b)(ii) provides as follows:

> Whoever, having been so employed (having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia) and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other persons (except the United States) by personal presence at any formal or informal appearance before --
>
> (1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and
>
> (2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge,

> accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and
>
> (3) . . . in which he participated personally and substantially as an officer or employee . . .
>
> shall be fined not more than $10,000 or imprisoned not more than two years, or both 1/

Generally, subsection 207(b)(ii), for two years after their government employment has ceased, bars former officials who are subject to its terms from representing, aiding, counseling, advising, consulting, or assisting in representing anyone except the United States by personal presence at any formal or informal appearance before a federal forum or official, in connection with particular matters involving a specific party or parties in which they participated personally and substantially as government officials.

Congress intended the words "by personal presence at" to convey the meaning that the prohibition on aiding and assisting applies only to the former official's physical presence at a formal or informal appearance. Hence, the bar would not apply to oral or written communications such as conveying material to the United States, telephone calls, correspondence, or aiding in the preparation of a brief. H.R. Rep. No. 115, 96th Cong., 1st Sess.

1/ For offenses committed after December 31, 1984, the maximum fine has been greatly increased, to include as one possible penalty a fine of $250,000. 18 U.S.C. §3623.

6, reprinted in 1979 U.S. Code Cong. & Ad. News 328-333. Such communications, however, could still be barred under 18 U.S.C. §207(a).

B. 18 U.S.C. 207(c)

Subsection 207(c) provides:

> (c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to --
>
> (1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and
>
> (2) in connection with any judicial, rule-making, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and
>
> (3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest --

Generally, subsection 207(c) prohibits officials who are subject to its terms from representing anyone except the United States before the agency where such official served in connection with any particular matter which is pending before such agency or in which such agency has a direct and substantial interest.

C. 18 U.S.C. §207(d)

18 U.S.C. §§207(b)(ii) and 207(c) apply only to former officials as specified in 18 U.S.C. §207(d) as follows:

1. 18 U.S.C. 207(d)(1)(A): Officials paid under the Executive Schedule Pay Rates or at a comparable rate

These are set forth in 5 U.S.C. §§5311 to 5318, and are to be distinguished from the General Schedule Pay Rates, or "GS Levels" which are found at 5 U.S.C. §5331, et seq. There are five pay levels in the Executive Schedule. Level I positions are the Cabinet level positions, including the Secretaries of the major departments and the Attorney General. 5 U.S.C. §5312. Level II includes the Secretaries of the Air Force, Army, and Navy, as well as certain Deputy Secretaries, Directors, Chairpersons, and Administrators of various departments and agencies. 5 U.S.C. §5313. Level III positions under 5 U.S.C. §5314 include various Under Secretaries, Chairpersons, and Deputy Administrators. Level IV positions under 5 U.S.C. §5315 include other Assistant Secretaries, Deputies, General Counsels, Inspectors General, and Members of a variety of Boards, Commissions, and Councils. Finally, Level V positions, under 5 U.S.C. §5316, include other Inspectors General, General Counsels, Assistant Directors and various Commissioners, Directors, Deputies, and Administrators. This authorized pay for Level V positions is significant because Senior Employees include any officer or employee receiving a rate of pay under other authority comparable to or greater than that set forth in the Executive Schedule. The phrase "under other authority" is

currently interpreted by the Office of Government Ethics as not including any employee paid under the General Schedule. Thus, all senior employees from within the ranks of General Schedule employees are subject to designation pursuant to 18 U.S.C. §207(d)(1)(C), discussed infra; they are not designated by operation of 18 U.S.C. §207(d)(1)(A).

2. 18 U.S.C. §207(d)(1)(B): Senior Commissioned Officers of the Uniformed Services

These are officers in pay grades 0-9 and 0-10 as set forth in 37 U.S.C. §201. That statute defines the following positions: 0-9 includes the ranks of Lieutenant General in the Army, Air Force, and Marine Corps, the rank of Vice Admiral in the Navy, Coast Guard, and National Oceanic and Atmospheric Administration, and the position of Surgeon General in the Public Health Service; 0-10 includes the ranks of General in the Army, Air Force and Marine Corps, and Admiral in the Navy, Coast Guard and National Oceanic and Atmospheric Administration.

3. 18 U.S.C. §207(d)(1)(C): Employees in positions involving significant decision-making or supervisory responsibility

These positions are designated by the Director of the Office of Government Ethics. However, the Director may only designate positions from within certain classes of positions which involve significant decision-making or supervisory responsibility. Thus, the Director may designate positions from those:

> 1. For which the basic pay rate is equal to or greater than that of a GS-17 and which are not covered by 18 U.S.C. §207(d)(1)(A) or §207(d)(1)(B), supra. (An individual's basic rate of pay is to be determined by his/her GS level alone, without regard to his/her step or any

ceiling limitation imposed by law. 5 C.F.R. §737.25(b)(4);

2. Which are part of the Senior Executive Service (SES); or

3. Which are active duty commissioned officers assigned to pay grade 0-7 (Brigadier General, Commodore, and Assistant Surgeon General having the rank of Brigadier General) or to pay grade 0-8 (Major General, Rear Admiral, Deputy Surgeon General, and Assistant Surgeon general having rank of Major General). These two pay grades are defined by 37 U.S.C. §201.

The Director of the Office of Government Ethics must designate on an annual basis which positions within the above three categories involve significant decision-making or supervisory responsibility. These designations appear at 5 C.F.R. §737.33 for each federal agency.

D. Exceptions

There are significant exceptions which apply to the prohibition of subsection 207(c).

First, Subsection 207(c) is the only prohibition in 18 U.S.C. §207 which does not apply to a special Government employee, as that term is defined in 18 U.S.C. §202(a), provided that special Government employee has served in a Government position for less than sixty days in a given calendar year.

Second, Subsection 207(c) does not apply to a former official who is an elected official of a state or local government. 18 U.S.C. §207(d)(2)(A).

Third, Subsection 207(c) does not apply to a former official who is principally occupied or employed with a state or local agency, an accredited institution of higher education, or certain

hospitals or medical research organizations, provided the official's appearance or communication is on behalf of such agency, institution, or organization. 18 U.S.C. §207(d)(2)(B).

Fourth, Subsection 207(c) does not prevent a former official from appearing before or communicating with the official's former agency on matters of a personal and individual nature, such as personal income tax or pension benefits. 18 U.S.C. 207(i).

Fifth, Subsection 207(c) does not prohibit a former official form making or providing a statement based on the official's own special knowledge in the particular area that is the subject matter of the statement, provided that the official receives no unauthorized compensation in connection with the statement. 18 U.S.C. §207(i). Thus a former official is not barred from expressing personal views to the official's former agency, from providing information when requested by the official's former agency on a matter in which the official had been involved as a government employee, or from recommending someone for employment with the official's former agency based on the official's own personal knowledge of that person. 5 U.S.C. §737.11(i). See also OGE 81X9 (February 25, 1981) (illustrates that it is appropriate to be responsive to the agency's request for assistance); OGE 81X28 (August 21, 1981) (illustrates when it is appropriate to recommend a candidate for employment).

Sixth, the operation of the subsection 207(c) bar can be limited to less than the entirety of a department or agency. This limitation reflects the congressional belief that given the complexity and size of some executive departments, it would be

unfair to apply a department-wide, one-year ban to former officials of an entity which in reality is separate and distinct from its parent department or agency. Congress determined that there was little danger that former officials of such a separate and distinct entity could exercise undue influence over officials and other units of their department. S. Rep. No. 170, 95th Cong., 1st Sess. 154 (1977), reprinted in, 1978 U.S. Code Cong. & Ad. News 4370. Consequently, two mechanisms for limiting the operation of 18 U.S.C. §207(c) have been provided. The first is found at 18 U.S.C. §207(d)(1)(C), which provides that the Director of the Office of Government Ethics may limit the operation of 18 U.S.C. §207(c) to permit former officials of a separate bureau or department within an agency to have communications with and appearances before other separate and unrelated bureaus and departments within the same parent agency. To do so, the Director must determine that there exists no potential for the use of undue influence or unfair advantage. The designations of such separate components of agencies pursuant to 18 U.S.C. §207(d)(1)(C) are found at 5 C.F.R. 737.32.

A second mechanism for limiting the operation of 18 U.S.C. §207(c) is found at 18 U.S.C. §207(e) which provides that the Director of the Office of Government Ethics may accomplish the same effect as under 18 U.S.C. §207(d)(1)(C) by designating as separate a statutory agency or bureau which exercises distinct and separate functions from those of other organizational units within its parent agency. A former senior employee of such a designated unit would then be free of the restrictions of 18 U.S.C. §207(c) with regard to the rest of the official's

former agency. 18 U.S.C. §207(e) specifically provides, however, that such designation would not apply to a former head of the designated unit or to a former senior employee whose official responsibilities included the designated unit; they would still be fully bound by the prohibition of 18 U.S.C. §207(c). The designations permitted by 18 U.S.C. §207(e) are found at 5 C.F.R. §737.31.

Essentially, the differences between 18 U.S.C. §207(d)(1)(C) and 18 U.S.C. §207(e) are that the latter can only apply to a subpart of an agency that has been created by statute, as opposed to having been created administratively, and positions automatically designated under Subsections 207(d)(1)(A) or 207(d)(1)(B) obtain no relief from the separate component designations made by the Office of Government Ethics under Subsection 207(d)(1)(C).

Seventh, Subsection 207(f) contains an exception to the prohibitions of 18 U.S.C. §207(a), (b), and (c) regarding the furnishing of scientific or technological information by former Government employees. This exception allows former Government employees to make communications solely for the purpose of furnishing scientific or technological information to the Government without regard to the various disqualifications imposed by 18 U.S.C. §207, provided the former employee complies with the procedures for such communications promulgated by the particular department or agency with which the official is communicating. An exempted communication is not limited to the actual furnishing of scientific or technological information, but includes an inquiry to determine the type or form of information required.

5 C.F.R. §737.15(a). However, Congress intended that this exemption would not apply to communications made with the intent to influence. H.R. Rep. No. 1756, 95th Cong., 2d Sess. 76, reprinted in 1978 U.S. Code Cong. & Ad. News 4392.

Subsection 207(f) also provides a means to exempt a particular former employee for the prohibitions of the statute where the former employee has outstanding qualifications in a scientific, technological, or other technical discipline. This method would permit such a former employee to communicate with a department or agency if the head of the department or agency publishes a certifications in the Federal Register that the former employee is so qualified, that the employee is acting with respect to a particular matter which requires such qualifications, and that the national interest would e served by such former employee's participation. This certification exemption should be used only where the former employee's involvement in a matter is needed on so continuous and comprehensive a basis that compliance with an agency's usual procedures for furnishing scientific or technical information would be burdensome and impractical. 5 C.F.R. §737.17(b).

Subsection 207(h) provides that nothing in section 207 prohibits a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

Responses to Questions Presented in the
Subcommittee's Letter of June 11, 1987
Addressed to the Attorney General

The questions presented in the Subcommittee's letter of June 11, 1987 are matters that are resolved by the Office of Government Ethics in consultation with each agency of government. OGE is responsible for making appropriate designations on the basis of information submitted to it by individual agencies, within certain statutory parameters. The Department of Justice is not part of the designation process and is thus unable to know whether there are employees and separate agencies that should be designated but which are not. In response to question 4, eliminating the ability of the Office of Government Ethics to compartmentalize departments and agencies for purposes of 18 U.S.C. 207(c) would neither enhance nor otherwise affect the ability of the Department of Justice to prosecute alleged violations of 18 U.S.C. 207(c). With regard to question 5, which asks whether the present compartmentalization of the Executive Office of the President should be eliminated, the present compartmentalization of the Executive Office of the President was effected by a 1983 designation of the Office of Government Ethics. These designations were necessary because of OGE's 1981 decision that, absent designations under 207(e), the Executive Office of the President was a single agency for purposes of 207(c). We have no reason to question the correctness of OGE's decision.

Aspects of 18 U.S.C. 207 Which The Department of Justice Would Like The Subcommittee to Consider

There are several aspects of 18 U.S.C. 207 which the Department of Justice believes would be worthwhile for the Subcommittee to consider; namely -

1. strengthening the administrative enforcement means supplied by 18 U.S.C. 207(j) by giving agencies subpoena power to compel the production of documents and testimony of witnesses during administrative enforcement proceedings;

2. applying the statute to the legislative and judicial branches;

3. grading knowing violations as misdemeanor offenses and willful violations as felonies;

4. revising 18 U.S.C. 207(b)(ii) to clarify whether mere presence is sufficient to constitute an offense or whether an act beyond mere presence must be proved.

We would be pleased to work with the staff of the Subcommittee towards drafting provisions which would accomplish the above-listed items if the Subcommittee wishes.

Mr. Chairman, that concludes my prepared remarks and I would be pleased to attempt to answer any questions you may have.

§ 737.31 Separate statutory agencies: Designations.

In accordance with the provisions of 18 U.S.C. 207(e) and § 737.13, each of the following departments or agencies is determined, for purposes of 18 U.S.C. 207(c), to have within it separate statutory agencies or bureaus as set forth below:

Parent Agency: EXECUTIVE OFFICE OF THE PRESIDENT
Separate Statutory Components:
Office of Management and Budget
Council of Economic Advisers
National Security Council
United States Trade Representation
Council for Environmental Quality
Office of Science and Technology Policy
Office of Administration
White House Office and the Office of Policy Development
Office of the Vice President
Parent Agency: DEPARTMENT OF THE TREASURY
Separate Statutory Components:
Bureau of Alcohol, Tobacco and Firearms
Bureau of Engraving and Printing
Bureau of the Mint
Comptroller of the Currency
Internal Revenue Service
United States Customs Service
United States Secret Service
Parent Agency: FEDERAL EMERGENCY MANAGEMENT AGENCY
Separate Statutory Components: United States Fire Administration
Parent Agency: OFFICE OF PERSONNEL MANAGEMENT
Separate Statutory Components: Office of Government Ethics
Parent Agency: DEPARTMENT OF HEALTH AND HUMAN SERVICES
Separate Statutory Components:
Food and Drug Administration
Public Health Service
Social Security Administration
Parent Agency: DEPARTMENT OF TRANSPORTATION
Separate Statutory Components:
Federal Aviation Administration
Federal Highway Administration
Federal Railroad Administration
Maritime Commission
National Highway Traffic Safety Administration
Saint Lawrence Seaway Development Corporation
United States Coast Guard
Urban Mass Transportation Administration
Parent Agency: DEPARTMENT OF LABOR
Separate Statutory Components:
Bureau of Labor Statistics
Mine Safety and Health Administration
Occupational Safety and Health Administration
Parent Agency: DEPARTMENT OF JUSTICE
Separate Statutory Components:
Bureau of Prisons (including Federal Prison Industries, Inc.)
Community Relations Service
Drug Enforcement Administration
Federal Bureau of Investigation
Foreign Claims Settlement Commission
[1]National Institute of Justice
[1]Bureau of Justice Statistics
[1]Office of Justice Assistance, Research and Statistics
Immigration and Naturalization Service
Independent Counsel
United States Parole Commission
Parent Agency: DEPARTMENT OF DEFENSE
Separate Statutory Components:
Department of the Army
Department of the Navy
Department of the Air Force
Defense Mapping Agency
Parent Agency: DEPARTMENT OF ENERGY
Separate Statutory Components:
Federal Energy Regulatory Commission
Parent Agency: DEPARTMENT OF COMMERCE
Separate Statutory Components:
Economic Development Administration
Patent and Trademark Office
National Oceanic and Atmospheric Administration
Bureau of the Census
Parent Agency: NATIONAL CREDIT UNION ADMINISTRATION
Separate Statutory Component:
Central Liquidity Facility
Parent Agency: NATIONAL CREDIT UNION ADMINISTRATION
Separate Statutory Component:
Central Liquidity Facility

[51 FR 25646, July 16, 1986]

§ 737.32 Separate components of agencies or bureaus: designations.

In accordance with the provisions of 18 U.S.C. 207(d)(1)(C) and § 737.14, each of the component agencies or bureaus as set forth below is determined, for purposes of 18 U.S.C. 207(c) and this Part 737, to be separate from the remaining agencies and bureaus of its parent agency (except such agencies and bureaus as specified):

Parent Agency: DEPARTMENT OF HEALTH AND HUMAN SERVICES
Separate Components:
Health Care Financing Administration
Parent Agency: DEPARTMENT OF TRANSPORTATION
Separate Components:
Alaska Railroad
Parent Agency: DEPARTMENT OF LABOR
Separate Components:
Employment and Training Administration
Employment Standards Administration
Labor-Management Services Administration
Parent Agency: DEPARTMENT OF DEFENSE
Separate Components:
Defense Communications Agency
Defense Intelligence Agency
Defense Nuclear Agency
National Security Agency
Defense Logistics Agency
Parent Agency: DEPARTMENT OF STATE
Separate Components:
Foreign Service Grievance Board
International Joint Commission, United States and Canada (American Section)
Parent Agency: DEPARTMENT OF JUSTICE
Separate Components:
Office of United States Attorney (for each judicial district (93))—however, each such Office is not designated as separate from the Office of the U.S. Marshal for the same judicial district.
Office of the United States Marshal (for each judicial district (96))—however, each such Office is not designated as separate from the Office of the U.S. Attorney for the same judicial district.
Antitrust Division
Civil Rights Division
Land and Natural Resources Division
Tax Division
Criminal Division
Office for Improvements in the Administration of Justice
Parent Agency: DEPARTMENT OF COMMERCE
Separate Components:
International Trade Administration
Minority Business Development Administration
National Telecommunication and Information Administration
Bureau of Industrial Economics

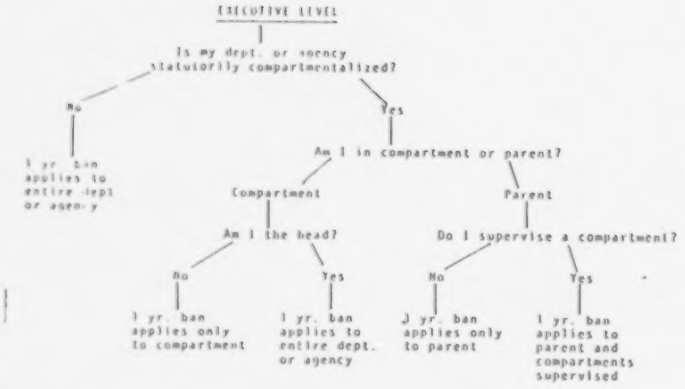
[51 FR 25646, July 16, 1986]

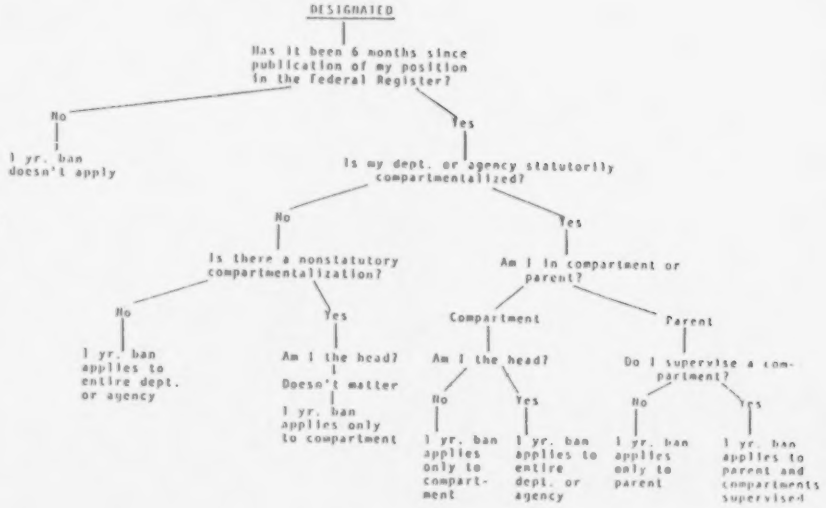
[1]These three components shall not, for purposes of 18 U.S.C. 207(c), be considered separate from one another but only from other separate components of the Department of Justice.

Prepared by Subcommittee on Oversight of Government Management Staff

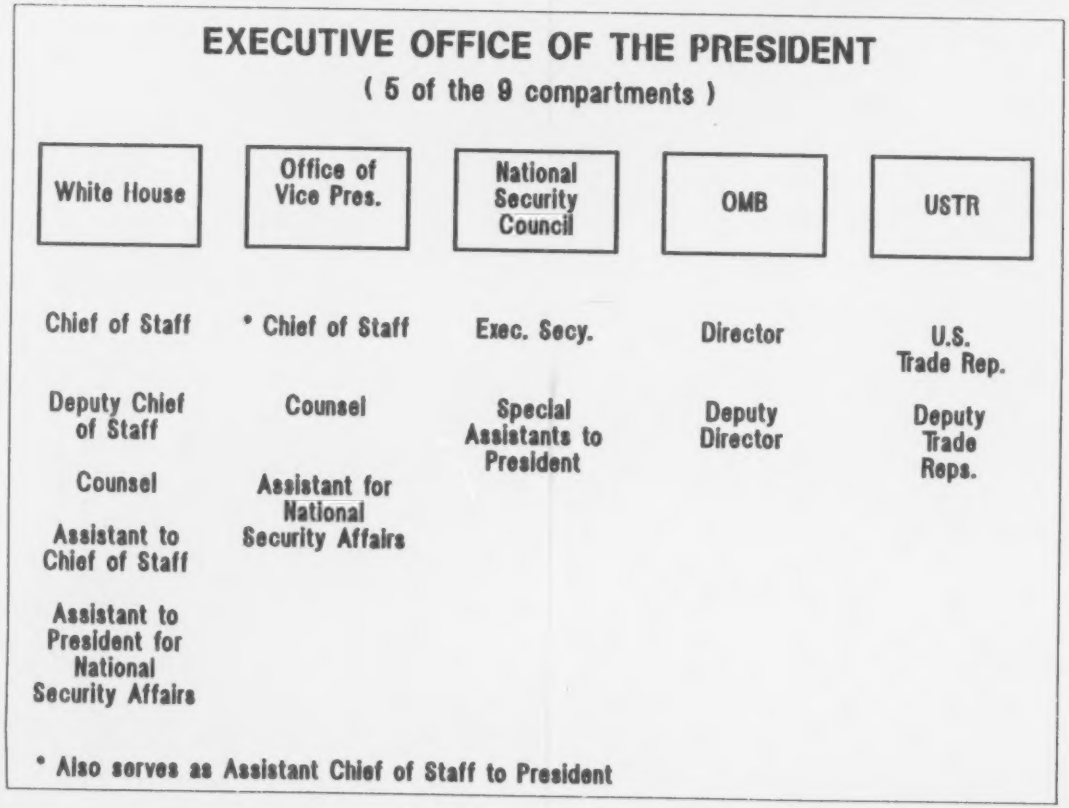
HOW DOES THE 207(c) BAN APPLY TO ME?

AM I EXECUTIVE LEVEL OR DESIGNATED?


EXECUTIVE LEVEL
Is my dept. or agency statutorily compartmentalized?
No
1 yr. ban applies to entire dept or agency
Yes
Am I in compartment or parent?
Compartment
Am I the head?
No
1 yr. ban applies only to compartment
Yes
1 yr. ban applies to entire dept. or agency
Parent
Do I supervise a compartment?
No
1 yr. ban applies only to parent
Yes
1 yr. ban applies to parent and compartments supervised


DESIGNATED
Has it been 6 months since publication of my position in the Federal Register?
No
1 yr. ban doesn't apply
Yes
Is my dept. or agency statutorily compartmentalized?
No
Is there a nonstatutory compartmentalization?
No
1 yr. ban applies to entire dept. or agency
Yes
Am I the head?
Doesn't matter
1 yr. ban applies only to compartment
Yes
Am I in compartment or parent?
Compartment
Am I the head?
No
1 yr. ban applies only to compartment
Yes
1 yr. ban applies to entire dept. or agency
Parent
Do I supervise a compartment?
No
1 yr. ban applies only to parent
Yes
1 yr. ban applies to parent and compartments supervised

Prepared by Subcommittee on
Oversight of Government
Management Staff



OGE's CHART

Outline for §207(c) Coverage

EXECUTIVE LEVEL IN PARENT

1. May not represent before parent. 207(e)

2. May not represent before any separate statutory agency if in supervisory chain of command. 207(e) 737.13(c)(3)

3. May not represent before any separate non-statutory agency regardless if in chain of command. (Separate non-stat. relief available only to "designated" employees.) 207(d)(1)(C) 737.13(d)(3)

EXECUTIVE LEVEL IN SEPARATE STATUTORY AGENCY

1. If head of agency, may not represent before any part of agency. 207(e) 737.13(c)(3)

2. If other than head, 207(c) restriction goes only to own separate statutory agency. 207(e) and 737.13(c)(3)

EXECUTIVE LEVEL IN SEPARATE NON-STATUTORY AGENCY

1. May not represent before parent or any separate non-statutory agency. 207(d)(1)(C) relief not available to Executive Levels.

2. May represent before any separate statutory agency if not in supervisory chain of command. 207(e).

NOTE: These restrictions are the same as Executive Level in Parent.

DESIGNATED IN PARENT

1. May not represent before parent or separate non-statutory agencies under supervisory chain of command. 207(d)(1)(c) (OGE common law)

2. May represent before separate statutory agency if not in supervisory chain of command. 207(e)

DESIGNATED IN SEPARATE STATUTORY AGENCY

1. May not represent before own separate statutory agency, EXCEPT if head of the agency who is fully subject to 207(c).

DESIGNATED IN SEPARATE NON-STATUTORY AGENCY

1. May not represent before own separate non-statutory agency.

THE WHITE HOUSE

WASHINGTON

January 16, 1981

Mr. J. Jackson Walter
Director
Office of Government Ethics
Washington, D. C. 20415

Dear Mr. Walter:

This letter sets forth our interpretation concerning the application of the one year "cooling off" period required by 18 U.S.C. 207(c) for certain officials (as described in 18 U.S.C. 207(d)) within the Executive Office of the President. This interpretation accommodates the purpose of section 207(c)—that any official described in section 207(d) be precluded from making certain communications1/ for one year after the end of Government employment to "the department or agency in which he served"—with the unique stituation that neither the Executive Office of the President2/ nor many of the entities commonly considered to be included within that "Office" are departments or agencies. In other words, this interpretation would describe the "agency" with which the covered officials within the Executive Office of the President would be precluded from making certain communications for one year after leaving Government employment.

The interpretation is that (1) the entities within the Executive Office of the President which are agencies be treated as other agencies are for the purposes of 18 U.S.C. 207; (2) the determination of whether an entity is an agency be based upon most of the criteria (set forth as Attachment A) that are common to other agencies, e.g., statutory designation as an agency, application of other laws which apply to agencies; and (3) the entities which are not agencies be collectively treated as a single "agency" for purposes of 18 U.S.C. 207(c).

As the short description concerning the Executive Office of the President in the United States Government Manual, 1980-1981, indicates, various agencies were transferred to the Executive Office of the President in 1939 and changes to its composition and organization have regularly occurred since. The current Government Manual includes the following entities within the Executive Office of the President:

The White House Office

The Intelligence Oversight Board

The Office of Management and Budget

The Domestic Policy Staff

The National Security Council

The Council of Economic Advisers

The Office of Science and Technology Policy

The Council on Environmental Quality

The Office of Administration

The Council on Wage and Price Stability

The Office of United States Trade Representative.

Although not listed in the Government Manual, the Vice President's Office is included in this interpretation.

Applying the criteria set forth in Attachment A, we conclude that the following are separate agencies for purposes of section 207(c):

The Office of Management and Budget

The Office of Science and Technology Policy

The Council on Environmental Quality

The Office of Administration

The Council on Wage and Price Stability

The Office of the United States Trade Representative

The National Security Council.

The remaining Executive Office entities would be considered under this interpretation to be a single "agency" for the purposes of section 207(c). They are:

The Vice President's Office

The White House Office

The Intelligence Oversight Board

The Domestic Policy Staff

The Council of Economic Advisers.

The treatment of these components as a single "agency" properly reflects their relationship to each other and to the other EOP components. The staffs of this core group interact with each other regularly and extensively in assisting and advising the President or Vice President. Conversely, their dealings with the staffs of the other EOP components (i.e., those which substantially conform to the agency criteria) are usually significantly more limited, and resemble their dealings with the staffs of the departments and agencies outside of the EOP.

Under this interpretation the Director of the Office of Management and Budget, for example, would be precluded from making communications covered by 18 U.S.C. 207(c) with the Office of Management and Budget or its officers or employees for one year after his employment ended. The Director would not, however, be barred by that section from communications with, for example, the Vice President's Office or the Council on Environmental Quality.

The Director of the Office of Management and Budget would, of course, be precluded from certain communications on particular matters involving a specific party or parties as required in 18 U.S.C. 207(a) and (b), regardless of the fact that the communication might be with an agency other than OMB. Therefore, the Director of the Office of Management and Budget would be precluded, for example, from representational communications with the Vice President's Office or the Council on Environmental Quality on matters covered by these sections. We shall ensure that departing officials appreciate the full scope of these sections and are urged to act in conformance with the guidance provided by the Act and your regulations.

Our interpretation would apply the 207(c) restrictions to all the officers and employees described in 18 U.S.C. 207(d) in the entities which are not separate agencies. The bar would preclude a covered communication, for example, from a former official of the Domestic Policy Staff to the White House Office or an officer or employee thereof for a period of one year from the end of employment.

Finally, although the restriction is not required by the Ethics Act, in order to avoid any appearance of impropriety, we intend to request the departing heads of the agencies within the Executive Office of the President to refrain from the type of communications prohibited by section 207(c) with any member of the collective "agency" for one year after leaving government employment. We also intend to request all departing staff members of the collective "agency" to refrain from such communications with the heads of the agencies within the Executive Office of the President for a similar period. This request would acknowledge the close working relationships between these parties. The request would preclude, for example, section 207(c) communications by the Director of the Office of Management and Budget to or from any member of the Domestic Policy Staff or the White House Office, but would not prohibit such communications with the Office of Science and Technology Policy or the National Security Council.

This interpretation, developed by the Counsel to the President, the Vice President's Counsel and the General Counsel of the Office of Management and Budget, has the approval of each of the entities in the Executive Office of the President. We do not believe that any action is required by your Office with regard to this interpretation. We will continue to provide guidance consistent with this interpretation to the departing officials within the Executive Office of the President. We will be pleased to discuss with you any concerns or suggestions that you may have concerning this interpretation.

Sincerely,

Jack H. Watson

Jack H. Watson, Jr.

Enclosure

1/ The limitation set forth in 18 U.S.C. 207(c) applies also to knowingly acting as an agent or attorney for or otherwise representing anyone other than the United States in any formal or informal appearance before the department or agency in which he served as an officer.

2/ The "Executive Office of the President" is not an agency for purposes of 18 U.S.C. 207, or for any other purpose we know of. While often referred to in material such as the Government Manual, it is a term descriptive of entities—some of which themselves are agencies—which are organizationally proximal to the President. In that regard it is like the Cabinet which also is not an agency.

(Footnote #2 continued on the next page.)

(Footnote #2 continued)

The Executive Office of the President is not legally, practically or functionally an agency. Its components receive separate appropriations, have separate authorities, functions and limitations, and are headed by different officials. The Executive Office of the President has no staff, no common function or responsibility and no statutory basis. It has no authority to act. Indeed, to develop this interpretation to deal with the Executive Office of the President, we had to coordinate with each of the entities which we have construed as part of the Executive Office of the President.

The laws that apply to agencies, e.g., the Administrative Procedure Act, the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Advisory Committee Act, do not apply to the Executive Office of the President although they do to some of the entities within the Executive Office of the President. Furthermore, some of the entities in the Executive Office of the President are created by statute and designated by statute as an agency, and not as a part of any other agency. Many have their own Ethics Act officers. OMB has even received authority to treat one of its separate components—the Office of Federal Procurement Policy—as a separate agency for 18 U.S.C. 207(c) purposes pursuant to 18 U.S.C. 207(e), an action inconsistent with a view that OMB is not an agency or that the Executive Office of the President is.

18 U.S.C. 207 is a criminal statute which should be narrowly construed. This interpretation of agency is broad enough to carry out the intent of 18 U.S.C. 207(c). We are aware of no case or opinion pursuant to Chapter 11 of Title 18, United States Code, which would support the construction of the Executive Office of the President as an agency. And finally, the consequences of concluding that the Executive Office of the President is an agency in this instance could have severely adverse effects in other areas where problems and litigation frequently arise, e.g., the Freedom of Information, Privacy and Administrative Procedure Acts.

ATTACHMENT A

Criteria to determine which entities within the Executive Office of the President are "agencies" for the purposes of section 207(c) of Title 18, United States Code.

The criteria should be that the entity:

1. be created by statute;

2. be deemed by statute to be an agency;

3. is subject as an agency to other laws which generally apply to agencies, e.g., the Administrative Procedure Act, the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act, the Civil Service laws;

4. has as its head a Senate confirmed, Presidential appointee;

5. is separately budgeted for, and receives a separate appropriation directly—not a part of an appropriation for another agency;

6. has the statutorily derived authority to act independently (Soucie v. David standard);

7. has acted as an agency over a significant period of time;

8. has an Ethics Act official for that entity; and

9. is functionally separate of other EOP entities.

Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

JAN 19 1981

Honorable Jack H. Watson, Jr.
Assistant to the President
The White House
Washington, D. C.

Dear Mr. Watson:

We have received your letter of January 16, 1981, regarding the status of the Executive Office of the President for purposes of 18 USC §207(c).

As you know, this subject matter has been discussed from varying points of view at several meetings with representatives of the Executive Office and myself over the last seven months.

While we agree that it is appropriate to treat certain "agencies" within the Executive Office as separate from others within the same Office for purposes of 18 USC §207(c), we may very well have to obtain further documentation of the basis for your distinguishing between the two groups listed on pages two and three of your letter in order to complete our review.

Pending final resolution of this matter by the Office of Government Ethics, we support your intention to give the most cautious advice possible on the status quo to departing staff members of the various Executive Office "agencies" in regard to their communications back to the Executive Office of the President.

Sincerely,

Jackson Walter

J. Jackson Walter
Director, OGE

cc: Counsel to the President
Counsel to the Vice President
General Counsel, Office of Management and Budget

Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

MAR 31 1981

Honorable James A. Baker, III
Chief of Staff
The White House
1600 Pennsylvania Ave., N. W.
Washington, D. C. 20500

Dear Mr. Baker:

Jack H. Watson, Jr., then Chief of Staff to President Carter, sent a letter to the Office of Government Ethics ("OGE") on January 16, 1981, concerning the one year "cooling off" period required by 18 U.S.C. § 207(c) for certain officials within the Executive Office of the President.[1] The letter (copy attached) set forth an interpretation of 18 U.S.C. § 207(c) and (d) which in essence stated that for purposes of section 207(c) the Office of Management and Budget ("OMB"), the Office of Science and Technology Policy ("OSTP"), the Council on Environmental Quality, the Office of Administration, the Council on Wage and Price Stability, the Office of the United States Trade Representative and the National Security Council are separate agencies, not just separate components of an "agency" called the Executive Office of the President ("EOP"). Under this interpretation, OMB and OSTP, for example, are akin to independent agencies such as the Federal Trade Commission and the Federal Communications Commission in that they are not part of any larger "agency" than themselves and require no action by OGE under 207(c) to be "broken out" of the E.O.P. for purposes of 207(c).[2] In other words, the Offices and Councils listed above are separate agencies without OGE having any input into their status under 18 U.S.C. § 207(d) or (e).

We have researched the present status and the history of the various units within EOP and must disagree with Mr. Watson's threshold interpretation that the above EOP Offices and Councils are like independent agencies and not statutory and nonstatutory components of one larger "agency", the Executive Office of the President. In brief, we have found support for the opposite interpretation that the Executive Office of the President is one umbrella "agency" with changing components or units whose responsibilities themselves change from time to time. See Congressional Research Service 78-90 Gov. "The Executive Office of the President: Some Background Information" and 78-19 Gov. "Reorganizing the Executive Office of the President: Reorganization Plan No. 1 of 1977."

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[1] The "certain officials" who are affected by § 207 (c) are determined by the standards set forth in 18 U.S.C. § 207 (d), e.g. those persons who are paid at a comparable rate to Executive Level V.

[2] On January 19, 1981, OGE sent a reply letter to Mr. Watson which, among other things, stated that OGE might need further documentation to complete its review of the status of the entities within the EOP for 207(c) purposes. A copy of that letter is also attached.

As stated by President Carter in his Message to the Senate and the House of Representatives on July 15, 1977, concerning his Reorganization Plan No. 1 of 1977, 42 Fed. Reg. 56101:

> I. ...These recommendations [to eliminate seven of the seventeen units within the EOP and modify the functions of the other ten units, among other recommendations] arise from a careful, systematic study of the EOP. They are based on the premise that the EOP exists to serve the President and should be structured to meet his needs... The EOP now consists of the immediate White House Office, the Vice President's Office, the Office of Management and Budget, and fourteen other agencies. The EOP has a budget authority of about $80,000,000 and 1,712 full time employees....
>
> II. As the President's principal staff institution, there are several major things the EOP must do:
>
> ....
>
> Manage the budget and coordinate Administration positions on matters before the Congress.
>
> Manage the Presidential decision making processes efficiently and fairly, and bring the President the widest possible range of opinions.
>
> ....
>
> III. ...I propose to combine administrative support operations into a Central Administrative Unit in EOP to provide support in administrative services common to all EOP entities... The EOP has never before been organized as a single unified entity serving the President. It is only by viewing it as a whole that we can improve efficiency through steps like the Central Administrative Unit. (Emphasis added.)

Thus, from the above one can see that President Carter treated the EOP as one umbrella institution or "agency" with defined missions and a single budget. The Reorganization Plan No. 1 of 1977 was premised entirely on this fact.

We have not found support in our research for the efficacy of the criteria set forth in Attachment A of Mr. Watson's January 16, 1981 letter which Mr. Watson wants used "to determine which entities within the Executive Office of the President are 'agencies' for the purposes of section 207(c) of Title 18, United States Code."[3] For example, whether or not the entity was created by statute (Criteria No. 1) has no particular relevance one way or the other in determining whether it is an agency for purposes of the Ethics in Government Act of 1978. The Act itself contemplates certain "separate" statutorily created entities which are not thereby to be considered as agencies. See 18 U.S.C. § 207(c). Whether or not the entity is subject as an agency to other laws such as

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[3]The quote is from Attachment A of that letter. None of the normally used statutory definitions of "agency" or "department", see 18 U.S.C. § 6, 5 U.S.C. §§ 104-105, are helpful or determinative here. Needless to say, we agree with Mr. Watson's implicit position that there are no direct analogues to the E.O.P. in any other part of the executive branch.

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the Administrative Procedure Act, the Freedom of Information Act, and the Privacy Act (Criteria 3) likewise is of no particular significance because these laws apply to separate components of agencies as well as to agencies as a whole. Whether or not the entity has a separate budget and receives a separate appropriation directly (Criteria 4) leads to the opposite conclusion Mr. Watson advocates because all of the EOP components received their specific appropriations under the umbrella heading the "Executive Office of the President." Pub. L. No. 96-74, Sept. 29, 1979, 93 Stat. 563. We should note that this form of appropriation is not unusual for components of executive departments such as the Federal Bureau of Investigation, a component of the Justice Department. In short, we do not find the criteria either individually or collectively in Attachment A persuasive on the issue of what is an "agency" for 18 U.S.C. § 207(c) purposes.

We would therefore recommend that you review the matter presented by Mr. Watson and make a presentation to OGE, if you so choose, of what statutory and non-statutory components within the Executive Office of the President are separate from each other for purposes of 18 U.S.C. § 207(c). We would suggest that you utilize the criteria of 18 U.S.C. § 207(d) and (c) in making your analysis and start from the premise that the EOP is an "agency" for purposes of 207(c). Finally, we recommend that you take the necessary steps to make sure that former EOP employees who left government after Mr. Watson's letter (Jan. 16, 1981) realize that the status quo of the EOP, a single agency not yet broken out into component parts, still exists--unless or until we rule on a new submission.

If we can answer any questions about this, please let me or David Scott, my Chief Counsel, know. The Office of Legal Counsel of the Department of Justice concurs in the conclusions of this letter.

Sincerely,

J. Jackson Walter
Director

Enclosures

cc: Office of Legal Counsel, Department of Justice

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THE WHITE HOUSE

WASHINGTON

December 6, 1982

Dear David:

Pursuant to 18 U.S.C § 207(e), it is requested that you make a determination that specific agencies within the Executive Office of the President (the "EOP") are "distinct and separate" from the remainder of the EOP for purposes of the application of the one year "cooling off" period of 18 U.S.C. § 207(c). Set forth below are (1) an interpretation of the standards established under 18 U.S.C. § 207(e) to be used in making this determination, and (2) an analysis of which entities within the EOP should be considered "distinct and separate" agencies for purposes of 18 U.S.C. § 207(c).

As you know, to qualify for separation as a distinct agency under § 207(e), an entity must be "a separate statutory agency or bureau within a department or agency" that "exercises functions which are distinct and separate from the remaining functions of the department or agency." 1/ The legislative history of § 207(e) identifies the Internal Revenue Service, the Food and Drug Administration and the Federal Aviation Administration as examples of agencies that satisfy these statutory criteria. 2/ Each of those agencies is characterized by (1) statutory responsibilities that are distinct within its umbrella department or

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1/ 18 U.S.C. § 207(e) provides:

> For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

2/ S. Rep. No. 170, 95th Cong., 1st Sess. 154 (1977).

agency, and (2) categorization as an "agency" under other statutes, such as the Freedom of Information Act, the Privacy Act and the Administrative Procedure Act, where such categorization is dispositive of the duties and requirements placed upon certain entities. 3/

As explained in detail in the enclosure to this letter, the same is true of the following agencies within the EOP:

- Office of Management and Budget
- Council of Economic Advisers
- National Security Council
- United States Trade Representative
- Council for Environmental Quality
- Office of Science and Technology Policy
- Office of Administration
- White House Office and the Office of Policy Development
- Office of the Vice President

3/ The IRS has unique responsibilities from the remainder of the Department of the Treasury, and is treated as a separate "agency" for purposes of the Freedom of Information Act, the Privacy Act and the Administrative Procedure Act. See 26 C.F.R. § 601 et seq. Unique responsibilities also characterize the FDA's relationship with the Department of Health and Human Services, and it is treated as a separate "agency" for purposes of the Freedom of Information Act, the Privacy Act and the Administrative Procedure Act. See 21 C.F.R. §§ 2 and 20. The FAA has unique responsibilities within the Department of Transportation, and is subject as a separate agency to the requirements of the Administrative Procedure Act but not to those of the Freedom of Information Act or the Privacy Act. See 14 C.F.R. § 11.

This interpretation would make the restrictions of 18 U.S.C. § 207(c) applicable to all officers and employees described in 18 U.S.C. § 207(d) in each separate and distinct agency identified above. Those designated officials would be precluded for one year from having any representational contact with their former agency. Of course, in accordance with 18 U.S.C. § 207(e), the heads of each of these separate agencies would be precluded from any representational contact with the entire EOP.

I will be happy to discuss at our earliest mutual convenience any concerns or suggestions you may have concerning this interpretation. Thank you for your consideration of this matter.

Sincerely,

Fred F. Fielding
Counsel to the President

David Scott
Acting Director
Office of Government Ethics
Office of Personnel Management
1900 E Street, N.W., Room 436H
Washington, D.C. 20415

Enclosure

The Executive Office of the President

Under authority of the Reorganization Act of 1939, 5 U.S.C. sections 133-133r, 133t note, various agencies were transferred to the Executive Office of the President ("EOP") by the President's Reorganization Plan Nos. 1 and 2 of 1939, effective July 1, 1939. Executive Order No. 8248 of September 8, 1939 established the divisions of the Executive Office and defined their functions.

The next substantial change in the structure of the EOP occurred with the adoption of Reorganization Plan No. 2 of 1970 (5 U.S.C. App.) Presidents have used Executive Orders, Reorganization Plans and legislative initiatives to reorganize the Executive Office to make its composition compatible with the goals of their administrations. Such amendments will be discussed below as they apply to specific agencies within the EOP.

1. Office of Management and Budget

The immediate predecessor of the Office of Management and Budget was the statutorily created Bureau of the Budget, created by the Budget and Accounting Act of 1921, 42 Stat. 22 (1921), 31 U.S.C. § 1 et seq. The Bureau of the Budget was transferred to the EOP pursuant to the Reorganization Act of 1939, 53 Stat. 1423 (1939).

The Office of Management and Budget was established in the Executive Office of the President pursuant to Reorganization Plan No. 2 of 1970, 84 Stat. 2085, codified at 31 U.S.C. § 16. The Office's functions now include the following:

> To assist the President in his program to develop and maintain effective government by reviewing the organization structure and management procedures of the Executive Branch to ensure that they are capable of producing the intended results;
>
> To assist in developing efficient coordinating mechanisms to implement Government activities and to expand interagency cooperation;
>
> To assist the President in the preparation of the budget and the formulation of the fiscal program of the Government;
>
> To supervise and control the administration of the budget;
>
> To assist the President by clearing and coordinating departmental advice on proposed legislation and by making recommendations as to Presidential

action on legislative enactments, in accordance with past practice;

To assist in the development of regulatory reform proposals and in programs for paperwork reduction, especially reporting burdens of the public;

To assist in the considerations and clearance and, where necessary, in the preparation of proposed Executive Orders and proclamations;

To plan and develop information systems to provide the President with program performance data;

To plan, conduct, and promote evaluation efforts to assist the President in the assessment of program objectives, performance, and efficiency;

To keep the President informed of the progress of activities by agencies of the Government with respect to work proposed, work actually initiated, and work completed, together with the relative timing of work between the several agencies of the Government all to the end that the work programs of the several agencies of the Executive Branch of the Government may be coordinated and that the moneys appropriated by the Congress may be expanded in the most economical manner with the least possible overlapping and duplication of effort.

The Office of Management and Budget is an agency subject to the Freedom of Information Act and Privacy Act. 5 C.F.R. § 1303.

2. Council of Economic Advisers

The Council of Economic Advisers was established in the EOP by the Employment Act of 1946 (15 U.S.C. § 1023). It now functions under that statute and Reorganization Plan No. 9 of 1953, effective August 1, 1953.

The Council consists of three members appointed by the President by and with the advice and consent of the Senate. One of the members is designated by the President as Chairman.

The Council analyzes the national economy and its various segments; advises the President on economic developments; appraises the economic programs and policies of the Federal Government; recommends to the President policies for economic growth and stability; and assists in the preparation of the economic reports of the President to Congress.

3. National Security Council

The National Security Council was established by the National Security Act of 1947 (50 U.S.C. § 402), amended by the National Security Act Amendments of 1949 (50 U.S.C. § 401 et seq.). By Reorganization Plan No. 4 of 1949, effective August 19, 1949 (5 U.S.C. App.), the Council was placed in the EOP.

The National Security Council is chaired by the President. Its statutory members are the Vice President and the Secretaries of State and Defense. The Chairman of the Joint Chiefs of Staff is the statutory military adviser to the Council, and the Director of Central Intelligence is its intelligence adviser.

The statutory function of the Council is to advise the President with respect to the integration of domestic, foreign, and military policies relating to national security. The National Security Council is an agency subject to the Freedom of Information Act and the Privacy Act, 32 C.F.R. § 2101.

4. Office of the United States Trade Representative

The Office of the United States Trade Representative was created, as the Office of the Special Representative for Trade Negotiations, by Executive Order No. 11075 of January 15, 1963. Congress, as part of the Trade Act of 1974 (19 U.S.C. § 2171), established the Office as an agency of the EOP charged with administering the trade agreements program under the Tariff Act of 1930 (19 U.S.C. § 1801) and the Trade Act of 1974 (19 U.S.C. § 2171). Other powers and responsibilities for coordinating trade policy were assigned to the Office by the Trade Act of 1974 and by the President in Executive Order No. 11846 of March 27, 1975, as amended.

Reorganization Plan No. 3 of 1979, implemented by Executive Order No. 12188 of January 4, 1980, charged the Office with responsibilities for setting and administering overall trade policy. It also provides that the United States Trade Representative shall be chief representative of the United States for all activities of the General Agreement on Tariffs and Trade; for discussions, meetings, and negotiations in the Organization for Economic Cooperation and Development when such activities deal primarily with trade and commodity issues; for negotiations in the United Nations Conference on Trade and Development and other multilateral institutions when such negotiations deal primarily with trade and commodity issues; for other bilateral and multilateral negotiations when trade, including East-West trade, or commodities is the primary issue; for negotiations under sections 704 and 734 of the Tariff Act of 1930 and for negotiations concerning direct investment incentives and disincentives and bilateral investment issues concerning barriers to investment.

The Office is headed by the United States Trade Representative, a Cabinet-level official with the rank of Ambassador, who is directly responsible to the President. There are two Deputy United States Trade Representatives, who also hold the rank of Ambassador, one located in Washington and one in Geneva. The Office is supported by a small professional and administrative staff.

The United States Trade Representative chairs the Cabinet-level Trade Policy Committee. Established by, and under the chairmanship of, the Office of United States Trade Representative are three other interagency committees: the Trade Policy Review Group, the Trade Negotiations Committee, and the Trade Policy Staff Committee.

The Trade Representative serves as an ex officio member of the Boards of Directors of the Export-Import Bank and the Overseas Private Investment Corporation, and serves on the National Advisory Council for International Monetary and Financial Policy.

The United States Trade Representative is responsible for the direction of all trade negotiations of the United States and for the formulation of trade policy for the United States.

The office is an agency subject to the Freedom of Information Act, the Privacy Act and the Administrative Procedures Act, 15 C.F.R. §§ 2004-2007.

5. Council on Environmental Quality

The Council on Environmental Quality was established by the National Environmental Policy Act of 1969 (42 U.S.C. § 4321, et seq.), to formulate and recommend national policies to promote the improvement of the quality of the environment. Additional responsibilities were provided by the Environmental Quality Improvement Act of 1970 (42 U.S.C. § 4371, et seq.).

The Council consists of three members appointed by the President, by and with the advice and consent of the Senate. One of the members is designated by the President as Chairman.

The Council develops and recommends to the President national policies which further environmental quality; performs a continuing analysis of changes or trends in the national environment; reviews and appraises programs of the Federal Government to determine their contributions to sound environmental policy; conducts studies, research, and analysis relating to ecological systems and environmental quality; and assists the President in the preparation of the annual environmental quality report to the Congress.

6. Office of Science and Technology Policy

The Office of Science and Technology Policy was established within the EOP by the National Science and Technology Policy, Organization, and Priorities Act of 1976 (42 U.S.C. § 6611), enacted May 11, 1976.

The Office serves as a source of scientific, engineering, and technological analysis and judgment for the President with respect to major policies, plans, and programs of the Federal Government. In carrying out this mission, the act provides that the Office shall advise the President of scientific and technological considerations involved in areas of national concern, including the economy, national security, health, foreign relations, and the environment; evaluate the scale, quality, and effectiveness of the Federal effort in science and technology; provide advice and assistance to the President, the Office of Management and Budget, and Federal agencies through the Federal budget development process; and assist the President in providing leadership and coordination of the research and development programs in the Federal Government.

7. Office of Administration

The Office of Administration was established within the EOP by the statutorily authorized Reorganization Plan No. 1 of 1977. The Office was activated, effective December 4, 1977, by Executive Order No. 12028 of December 12, 1977. It was statutorily recognized in the 1978 Authorization Act, 5 U.S.C. § 107(b).

The Office of Administration, headed by the Director, is authorized by Executive Order No. 12028 to provide administrative support services to all units within the EOP, except those services which are in direct support of the President. The services provided by the Office of Administration include information, personnel, and financial management; data processing; library services; records maintenance; and general office operations, such as non-Presidential mail, messenger, printing, procurement, and supply services.

The Office of Administration is an agency subject to the Freedom of Information Act and the Privacy Act, 3 C.F.R. § 2502.

8. White House Office and the Office of Policy Development

The White House Office serves the President in the performance of the many detailed activities incident to his immediate office. Prior to the Administration of Franklin Roosevelt, little or no interest was shown in equipping him with administrative staff facilities. As a consequence, the President's advisory staff had remained small. In fact, the Act of April 12, 1926, ch. 171, 44 Stat. 305 authorized one secretary to the President.

With the advent of the "New Deal" and the "Service State," and due to the national security coordination requirements which surfaced during World Wars I and II, the need arose for more staff to carry out the statutorily assigned task of general supervision and overall management of the government. Basic facilities were seemingly justified to mitigate the burdens of the President's Constitutional duties as Chief Executive, Commander in Chief of the Military, and diplomatic Head of State. The authority for the establishment of an official "White House Office" was granted pursuant to the Reorganization Act of 1939, supra, and Executive Order No. 8248.

The term "Assistant to the President" informally evolved as the title given the senior staff aide during the Truman Administration. The Eisenhower Administration, through informal conversion of this position to that of Chief of Staff, brought about more of an "agency" status to the White House Office than had characterized the body in the past. Both titles have been maintained and expanded since then.

In 1978 Congress passed the first formal Authorization Act for the White House Office, 5 U.S.C. § 105, establishing fifty Executive Level positions for the White House Office.

Today the staff of the President contains a "Counsellor" with Assistant to the President status and Cabinet rank, a Chief and Deputy Chief of Staff, other senior Assistants to the President and various professional and administrative aides. The staff provides legal counsel to the President, facilitates and maintains communication with the Congress, the heads of Executive departments and agencies, the press and other information media, and the general public. The staff provides for the orderly handling of official documents, correspondence, clerical services and procedures relating thereto. It also includes staff assigned to the First Lady, authorized by 5 U.S.C. § 105(e), and the Executive Residence staff, authorized by 5 U.S.C. § 105(b).

The original predecessor of the Office of Policy Development, the Domestic Council, was established in the EOP pursuant to the statutory authority of the Reorganization Plan No. 2 of 1970, effective July 1, 1970. The Council was revised and renamed the Domestic Policy Staff pursuant to the statutory authority of the Reorganization Plan No. 1 of 1977, effective March 26, 1978, pursuant to Executive Order No. 12045 of March 27, 1978. It was statutorily established by the 1978 Authorization Act, 5 U.S.C. § 107 (a). Since 1981, the staff has been redesignated the Office of Policy Development. It formulates and coordinates domestic policy recommendations to be presented to the President.

10. Office of the Vice President of the United States

Article II, section 1 of the Constitution provides that the President "shall hold his Office during the Term of four Years . . . together with the Vice President..."

In addition to his Constitutional role as President of the Senate, (Art. I, § 3, cl. 4), the Vice President is empowered to succeed to the Presidency, pursuant to Article II and the 20th and 25th Amendments to the Constitution.

The executive functions of the Vice President include participation in all Cabinet meetings, and, pursuant to the National Security Act of 1947, supra, membership in the National Security Council. He also serves on the Board of Regents of the Smithsonian Institution, pursuant to 20 U.S.C. §§ 41 and 42. Prior to 1978 the Vice President's executive office and staff were part of the White House Office and financed from its appropriations. The 1978 Authorization Act formally recognized his executive functions and provided for a separate appropriation for this purpose (3 U.S.C. § 106).

Separate funds are provided as part of the Legislative Appropriation to furnish staff assistance to the Vice President in carrying out his functions as President of the Senate.

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

MAR 7 1983

Honorable Fred F. Fielding
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Fielding:

Your letter of December 6, 1982 with supporting memorandum recommended that nine operating units within the Executive Office of the President be designated as separate statutory agencies under the provisions of 18 U.S.C. § 207(e).

We have reviewed your recommendations and supporting materials, and have concluded that the following named Offices/Councils within the Executive Office of the President meet the requirements for designation as "separate statutory agencies" under the provisions of 18 U.S.C. § 207(e):

- Office of Management and Budget
- Council of Economic Advisers
- National Security Council
- United States Trade Representative
- Council for Environmental Quality
- Office of Science and Technology Policy
- Office of Administration
- White House Office and the Office of Policy Development
- Office of the Vice President

In arriving at our conclusions, we have determined that, based upon authority derived from Statute or Executive Order/Reorganization plans, each of the units mentioned above exercises functions that are distinct and separate from the rest of the Executive Office of the President and meet the criteria as set forth in 18 U.S.C. § 207(e) and 5 C.F.R. § 737.13(c).

Our findings make the restrictions of 18 U.S.C. § 207(c) applicable to all officers and employees described in 18 U.S.C. § 207(d)(1) in each of the nine separate entities mentioned above. Such "senior" officers and employees would now be precluded under § 207(c) for one year after leaving government service from having any representational contact only with their former agency. However, the heads of each of these nine "agencies" described above are still precluded from any representational contact for one year after leaving the government with the entire Executive Office of the President pursuant to 18 U.S.C. § 207(e).

This Office will issue a rule amending 5 C.F.R. § 737.31 designating the aforementioned Offices/Councils within the Executive Office of the President as separate agencies for purposes of the "no contact" provisions of § 207(e) of Title 18 U.S.C., as amended. Since our annual (1982) amendments to 5 C.F.R. 737.33 (Senior Employee Designations) have just recently been published, we do not anticipate that such a rule will be published in the Federal Register until sometime late in 1983. However, you should inform all interested parties that our determination in this matter will be effective as of the date of this letter.

Should you have any questions concerning the foregoing proposed action, please do not hesitate to contact this Office.

Sincerely,

David R. Scott

David R. Scott
Acting Director

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510

May 22, 1986

The Honorable David H. Martin
Director
Office of Government Ethics
1717 H Street, N.W.
Room 436
Washington, D.C.

Dear Mr. Martin:

Our staff has discussed with you the Office of Government Ethics' designation of the Office of Management and Budget, as well as several other offices within the Executive Office of the President, as a "separate statutory agency" for purposes of applying the post-employment restrictions in 18 U.S.C. 207(c).

Correspondence provided by your office indicates that on March 7, 1983, your predecessor, David Scott, granted Fred Fielding's request that nine offices within the Executive Office of the President be designated as separate components. These agency classifications, however, were not published in the Federal Register until July 31, 1985.

On May 16, you were quoted by The New York Times as saying that these offices should be considered a single unit for purposes of the ethics laws because White House officials exert influence throughout the Executive Office of the President. You further were quoted as recommending legislation to ensure that all components of the Executive Office of the President are treated as part of the White House.

Since our Subcommittee would have jurisdiction over such legislation, we are interested in your views on this issue. We ask that you respond to the following questions:

1. Since, as director of the Office of Government Ethics, you already have the authority under 18 U.S.C. 207(e) to designate agencies as separate entities for purposes of the post-employment restrictions, do you believe that legislation is needed to treat all the

White House offices as one entity? In what ways is your current authority insufficient? What specific legislative changes do you recommend?

2. Do you intend to issue new regulations revoking the separate classification of the nine offices within the Executive Office of the President pursuant to your current authority under the Ethics in Government Act?

3. Prior to the July 1985 publication of the classification of the offices within the Executive Office of the President, did you review the decision of your predecessor to designate these nine offices as separate agencies for purposes of the post-employment restrictions?

4. What steps, if any, did you take to change the regulations before they were published in order to reflect your belief that the offices should not be considered as "separate statutory agencies" pursuant to 18 U.S.C. 207(e)?

Please provide us with your answers to these questions by Monday, June 9.

Thank you for your cooperation. We look forward to your reply.

Sincerely,

William S. Cohen
Chairman

Carl Levin
Ranking Minority Member

WSC:CL:fdv

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

Honorable Carl Levin
Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Levin:

By letter of May 22, 1986, you requested that I answer certain questions pertaining to past administrative decisions by this Office in making separate statutory component determinations pursuant to 18 U.S.C. §207(e).

Prior to responding to your questions, I feel that it is important to point out that as evidenced by Attachment (A) the rule propounding separate statutory authority for components within the Executive Office of the President was first published in the Federal Register on March 15, 1984 (94 FR 9808). Records of this Office further reveal that such a rule was initiated in November of 1983, with the actual publication date delayed by the necessity of agency publication clearance. This, of course, was in keeping with our March 7, 1983 letter to Mr. Fred F. Fielding, Counsel to the President, in which we indicated that since our annual amendments to 5 C.F.R. §737.33 had just recently been published in the Federal Register, we did not anticipate publishing a new rule until sometime late in 1983.

Additionally, while it is not my normal practice to attempt to correct the "slant" or accuracy of a reported newspaper story which involves me personally or my Office, I think that it is worth noting that when asked about the same issue by the Chairman of the Administrative Law and Governmental Relations Subcommittee of the House Judiciary Committee on May 21, 1986, I stated that I was currently reviewing this issue to determine whether any changes in the statutory components of the Executive Office of the President were necessary.

In my opinion, additional legislation is unnecessary to carry out the statutory scheme envisioned by 18 U.S.C. §207(e). Our current regulations at 5 C.F.R. Part 737.13 set forth the standards for making "separate" statutory findings for purposes of 18 U.S.C. §207. In part, the language of this provision is as follows:

> . . . but a decision as to the sufficiency of the statutory authority as well as the separability of functions shall be reserved to the Director, OGE.

Notwithstanding the language of section 207(c) and the limited legislative history surrounding the enactment of section 207(c) to support the position taken in our regulations, the record is replete with references which suggest that both the statutory and non-statutory component determinations should be based upon an independent finding that there is no potential for real or apparent undue influence or unfair advantage. (for instance, see Senator Ribicoff's comments at Cong. Rec. (Daily Ed.) June 14, 1979, S.7660, and Senator Percy's comments at Cong. Rec. (Daily Ed.) June 27, 1977, S.10725).

As you know from the correspondence between this Office and the White House, it was the position of Mr. Watson, President Carter's assistant, that the separate statutory components in the White House were indeed separate and that this Office need have no role under section 207(e) in declaring them separate for purposes of §207(c). Mr. Fielding's letter of December 1982, however, expressly recognized OGE's role regarding the White House components. My predecessor's decision on this matter was based upon his findings as to an issue which had surfaced in early January 1981 and made prior to my arrival. The rule was, however, promulgated and issued shortly after my arrival at OGE. I have now had an opportunity to observe its operation and I shall make my independent determinations as to its effects.

I will keep you advised.

Sincerely,

David H. Martin
Director

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

FEB 10 1987

Honorable Carl M. Levin
Chairman
Subcommittee on Oversight of Government
Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

By letter dated May 30, 1986, I responded to your questions pertaining to this Office's designation of separate statutory components pursuant to 18 U.S.C. § 207(e). At that time, it was my opinion that additional legislation was not necessary to carry out the statutory scheme envisioned by 18 U.S.C. § 207(e). With regard to the designation of separate statutory components within the Executive Office of the President, however, I indicated that I would make an independent determination as to the appropriateness of the designations and advise you of my determination.

Since last summer I have been collecting information to assist me in making this determination. After a thorough review of the matter, I have concluded that based on the criteria established by 18 U.S.C. § 207(e), the current designations for the Executive Office of the President should remain intact. The analysis for this decision follows.

The role of the Director of the Office of Government Ethics (OGE) in designating separate statutory components is discussed briefly in 18 U.S.C. § 207(e). According to that provision:

> . . . whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

The statutory language sets out the following test for the Director to apply in making a determination under 18 U.S.C. § 207(e): whether the agency proposed for designation is a separate statutory agency or bureau within a department or agency which exercises functions that are distinct and separate from the remaining functions of that department or agency. There are two elements to the test: 1) that there is statutory authority for the component agency; and 2) that the component agency exercises functions that are separate from the other functions of the agency.

The regulations interpreting this provision explain that the "decision as to the sufficiency of the statutory authority as well as the separability of functions shall be reserved to the Director, OGE." (5 C.F.R. § 737.13(c)(2)). As a result, the Director has discretion in determining what constitutes sufficient statutory authority and what constitutes sufficient separation of functions. OGE has consistently recognized as sufficient statutory authority any of the following: a statute, an Executive Order, a Reorganization Plan, or a combination of these authorities. Under that approach, there is sufficient statutory basis for designating as separate under 18 U.S.C. § 207(e) each component agency of the EOP.

As for the separation of functions, we have relied on the language contained in the statutory authority to make the determination. When the functions described in the authority are separate from functions of the parent agency, we have not looked behind that description to determine whether these functions are exercised or implemented separately. That there is some interaction between components or between a component and the parent agency has not precluded designation as long as the component has functions that are distinct and separate from those of the parent agency. For example, within the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) interact on matters of common concern and representatives of each serve on the regional Organized Crime Drug Enforcement Task Forces. Both the FBI and the DEA have been designated separate statutory components of DOJ.

It appears that the Director, OGE, has authority to conduct an investigation to determine whether the functions of separate statutory components are actually separate. However, it is not clear what would be gained from such an investigation. First, we would not want the determination on the separability of functions to depend upon the interactions that occur as a result of the unique personalities at a given agency at a given time. Second, OGE lacks the staff to conduct such investigations at each executive branch agency. Third, it is unclear what we could observe at the executive agency that would actually supplement the written authority.

After applying the statutory test to the components of the Executive Office of the President, we concluded, based on the statutory language, that the current designations should stand. First, each component has separate statutory authority in the form of a statute, an Executive Order, a Reorganization Plan, or a combination of these authorities. Second, based upon the language of the statutory authority in each case, it appears that each component has functions that are distinct and separate from those of the parent agency. Under this analysis, which is consistent with the analysis we have used in our previous designations, the current designations for the Executive Office of the President are appropriate.

We recognize that some may say that the Executive Office of the President is unique and should be handled differently from other agencies or that the statutory test is inadequate. However, the present statutory language does not treat the Executive Office of the President any differently than the other executive branch agencies, and we are constrained by the principles which we have applied to all other executive branch agencies from making a different determination.

Sincerely,

David H. Martin
Director

cc: Honorable William S. Cohen

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MARY BERRY LERNER, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510-6250

May 5, 1987

Mr. William L. Ball III
Assistant to the President for Legislative Affairs
The White House
Washington, D.C. 20500

Dear Mr. Ball:

The Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee is reviewing past 18 U.S.C. 207(e) designations, called "compartments," which have been made by the Office of Government Ethics (OGE), pursuant to the Subcommittee's responsibility to consider reauthorizing OGE.

Please provide the Subcommittee with the following information to further this review:

1. Please list, for each compartment in the Executive Office of the President, each statutorily designated position covered by 18 U.S.C. 207(c) and the name of the individual currently holding such position.

2. Please provide the same information for each specially designated position covered by 18 U.S.C. 207(c).

3. Please include in each of the these lists the name of the office which pays the salary of each of the above positions.

4. Please provide the title(s), salary level(s), and White House compartment(s) for former White House employee David Fischer during the last two years of his tenure.

Should you have any questions about this request, please phone Charlene Simmons of the Subcommittee staff at 224-3682. Your prompt attention to this request, on or before May 12, is appreciated.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

CL:WSC:ljg

THE WHITE HOUSE

WASHINGTON

May 26, 1987

Dear Senator Levin:

In response to your letter of May 5, I am enclosing the information you requested with respect to the positions designated by Executive Office of the President agencies under the provisions of 18 U.S.C. § 207(e). This information appears as attachment A.

In addition to these designations, you requested certain information on David Fischer. That information appears as attachment B.

An identical letter, with enclosures, is being furnished to Senator Cohen. I trust this information will prove useful to you as you consider authorizing the Office of Government Ethics.

With best wishes,

Sincerely,

William L. Ball, III
Assistant to the President

The Honorable Carl Levin
Chairman
Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Enclosures

ATTACHMENT A

(NOTE: Unless an asterisk appears by a name, the designated agency is also the agency which pays the salary of the listed position.)

NATIONAL SECURITY COUNCIL

STATUTORY

Green, Grant S. Jr.	EXEC SEC & SA TO THE PRES

DESIGNATED

Cockell, William A. Jr.	SA TO PRES FOR NSA
Danzansky, Stephen I.	SA TO PRES FOR NSA & DIR ICA
Fortier, Alison B.	SA TO PRES FOR NSA & SR DIR LA
Kelly, D. Barry	SA TO PRES FOR NSA & SR DIR INT AFF
Kraemer, Sven F.	DIRECTOR OF ARMS CONTROL
Rodman, Peter W.	SA TO PRES FOR NSA
Ross, Dennis B.	SD NE & SA AF
Sorzano, Jose S.	SA TO PRES FOR NSA & SD, LAA
Stevens, Paul S.	SA TO PR FOR NSA & NSC LEG ADV
Grimes, John G.	DIR DEF PGMS & DIR NAT SEC COM

COUNCIL OF ECONOMIC ADVISERS

STATUTORY

Moore, Thomas G.	MEMBER
Mussa, Michael L.	MEMBER
Sprinkel, Beryl W.	CHAIRMAN

Designated - None

COUNCIL ON ENVIRONMENTAL QUALITY

STATUTORY

Miles, William L.	MEMBER
Schafer, Jacqueline E.	MEMBER
Hill, A. Alan	CHAIRMAN

Designated - Note

OFFICE OF ADMINISTRATION

Statutory - None

DESIGNATE

DuPeza, Jules B.	DIRECTOR, ASD

OFFICE OF MANAGEMENT AND BUDGET

STATUTORY

Bedell, Robert P.	ADM, OFC OF FED PROCUR POL
Wright, Joseph R., Jr.	DEPUTY DIRECTOR
Miller, James C., III.	DIRECTOR

DESIGNATED

Arny, L. Wayne, III.	AD, NSIA
Carley, John H.	GENERAL COUNSEL
Crawford, Carol T.	ASSOC DIR FOR E & G
Eickhoff, M. Kathryn	AD FOR ECON POL
Gramm, Wendy L.	ADMIN, OIRA
Muris, Timothy J.	EX ASSO DIR FOR BUD & LEG
Riso, Gerald R.	ASSOC DIR FOR MGT
Steelman, Deborah L.	ASSOCIATE DIRECTOR
Boyd, Dennis C.	DEP ASSOC DIR FOR MGMT IMPROV
Frey, James M.	ASST DIR FOR LEGIS REF
Modlin, Carey P., Jr.	ASST DIR FOR BUDGET REVIEW
Al-Samarrie, Ahmad	DEP ASSOC DIR FOR ECON POL
Burman, Allan V.	DEP ADMIN, OFPP
Dale, Edwin L., Jr.	ASST DIRECTOR FOR PUBLIC AFRS
Dusault, Philip A.	DEP ASST DIR FOR IA
Gibbons, David M.	DAD FOR NR
Glozer, Kenneth G.	DEP ASSOC DIR FOR SPEC STUDIES
Hirshberg, Jennifer	AUST AD FOR COMM & PUB LIASN
Kleinberg, David K.	DEP ASSOC DIRECTOR FOR HIM
Macrae, James B., Jr.	DEP ADMIN, OIRA
Martin, Bernard H.	DEP ASSOCIATE DIR FOR LVE
Mathiasen, David G.	DEP ASST DIRECTOR FOR BR
Merck, John W.	DEPUTY ASSOCIATE DIRECTOR
Ryder, Kenneth F., Jr.	DAD FOR HTP
Schwartz, Kenneth L.	DAD FOR TCJ
Selfridge, Barbara S.	DEP ASSOC DIRECTOR FOR SSD/HRVL
Sitrin, David	DEP ASSOC DIR, NATL SECURITY
Sweeney, Naomi R.	DEP ASST DIR FOR LEG REFERENCE
Taft, Daniel H.	DEP ASSOC DIR FOR SSD/NSIA
Hezir, Joseph S.	DAD for E & S
Wheeler, Gordon B.	ASSOC DIR FOR LEG AFR HSE
Johnson, Darrell A.	ASSIST DIR FOR ADMIN
Cooney , John F.	DEP GEN COUN FOR RA & LIT
Burton, Larry D.	ASSO DR LEG AFR SENATE

OFFICE OF US TRADE REPPESENTATIVE

STATUTORY

Samuels, Michael A.	DUSTR (GENEVA)
Smith, Michael	DUSTR (PAYROLLED BY STATE DEPT)
Woods, M. Alan	DUSTR (W RANK AMB)
Yeutter, Clayton	US TRADE REP

DESIGNATED

Phillips, Donald M., JR.	ASST USTR FOR TR POL COORD
Rosenbaum, Jon H.	AUSTR FOR LA, CARIB & AFR
Wilson, Sherman B.	AUSTR FOR INDUST SVCS
Hathaway, C. Michael	SR DEP GEN COUNS
Bello, Judith H.	DEP GEN COUNSEL
Bolton, John Roger	DIR, PUB & IGA
Goldberg, Barry D.	DIR, COMP SVCS
Self, Richard B.	DEP AUSTR FOR SVCS
Meier, Richard G.	DEP ASST USTR FOR GATT AFFAIRS
Allgeier, Peter F.	AUSTR FOR ASIA & THE PACIF
Bale, Harvey E., Jr.	AUSTR FOR TRADE POL & ANALYSIS
Blum, Charles Henry	AUSTR FOR MULTI TRADE NEG
Doyle, Michael	ASST USTR FOR ADMIN
Early, Kathryn S.	AUSTR FOR AG AND COM POLY
Feketekuty, Geza	COUNSELOR TO THE USTR
Holmer, Alan F.	GENERAL COUNSEL
Houston, III, William H.	CHF TEXT NEGOT
Massey, Joseph A.	AUSTR FOR JAPAN & CHINA
Mosher, Sol	AUSTR FOR CONG AFFRS
Murphy, James M., Jr.	AUSTR FOR EUR & THE MEDITER
Murphy, Peter O.	SN US-CNDA NEG/CRD NA AFRS
Newkirk, William D.	ASST USTR FOR GATT AFFAIRS

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

STATUTORY

Graham, William R.	SCI ADV TO PRES & DIR, OSTP

DESIGNATED

Johnson, Richard G.	ASST DIR FOR SPACE SCI & TECH

OFFICE OF THE VICE PRESIDENT

STATUTORY

Gray, C. Boyden	COUN TO THE VICE PRES
Gregg, Donald P.	ASST TO VP FOR NATL SEC AFF

DESIGNATED

*Fuller, Craig	CHIEF OF STAFF TO THE VICE PRESIDENT

THE WHITE HOUSE OFFICE

STATUTORY

Baker, Howard H., Jr.	CHF OF STF TO PRES
Ball, William L., III.	ASST TO PRES FOR LA
Bauer, Gary L.	ASST TO PRES FOR POL DEV
Brady, James Scott	ASST TO PRES AND PRESS SEC
Carlucci, Frank C.	ASST TO PRES FOR NSA
Cribb, T. Kenneth, Jr.	ASST TO PRES FOR DOM AFFRS
Culvahouse, Arthur B., Jr.	COUNSEL TO THE PRES
Dawson, Rhett B.	ASST TO PRES FOR OPER
Donatelli, Frank J.	ASST TO PRES FR POL & IGA AF
Duberstein, Kenneth M.	DEP CHF OF STAFF
Fitzwater, Max Marlin	ASST TO PRES FOR PRES RELA
Fuller, Craig L.	ASST TO CHIEF OF STAFF
Griscom, Thomas G.	ASST TO PRES FOR COM & PLAN
Henkel, William	ASST TO PRES
Hobbs, Charels D.	ASST TO PRES
Risque, Nancy J.	CAB SEC AND ASST TO THE PRES
Chew, David L.	DA TO PRES
Courtemanche, Jack L.	DA PRES CHF STF 1ST LADY
Kranowitz, Alan M.	DA TO PRES FOR LA (HOUSE)
Lytton, William B.	DEP SPEC COUNS TO THE PRES
Maseng, Mari	DA TO PRES & DIR OFC PUB LSN
Ryan, Frederick J.. Jr.	DA PRES & DR PA & S, DR of PSI
Stephens, Jay B.	DEP COUNS TO PRES
Tracy, Alan T.	SA TO PRES FOR AG & TR & FD ASST
Tuck, John C.	DA TO PRES & EX ASST TO CHF OF STF
Crippen, Danny L.	DA TO PRES
Hooley, James L.	DA TO PRES & DIR OF ADV

*Mr. Fuller also serves as an Assistant to the Chief of Staff to the President. He is on the White House Office payroll.

THE WHITE HOUSE OFFICE

STATUTORY Continued

Turner, Pamela J.	DEP ASST TO PRES FOR LA
Tuttle, Robert H.	DEP AST TO PRES & DIR PRES PER
Dolan, Anthony R.	DA TO PRES & DIR OF SPCHWRTG
King, Gwendolyn S.	DA PRS & DIR IGA
Lavin, Franklin L.	DA TO PRE & DIR OFC OF POL AFS
Bradley, Melvin L.	SPEC ASST TO PRES FOR POL DEV
Cox, C. Christopher	SR ASSOC COUNS TO PRES
Harlow, Bryce L.	SA TO PRES FOR LA
Kupperman, Charles M.	SPEC ASST TO PRES FOR ADM
Sable, Ronald K.	SPEC AST TO PRES FOR LA (SEN)

Designated - None

OFFICE OF POLICY DEVELOPMENT*

STATUTORY

Driggs, Michael A.	SA TO PRES POL DEVEL

Designated - None

*For purposes of designation under 18 U.S.C. 207(e), the Office of Policy Development is considered part of the White House Office.

ATTACHMENT B

Question:

Please provide the title(s), salary level(s), and White House compartment(s) for former White House employee David Fischer during the last two years of his tenure.

Answer:

Mr. Fischer's title was: Special Assistant to the President.

Mr. Fischer was on the payroll of the White House Office. He left the White House Office in April of 1985. His salary for the period 4-1-83 to 4-7-85 follows:

4-83 to 1-8-84	$54,617.00
1-8-84 to 4-84	$56,810.00
4-84 to 1-6-85	$56,810.00
1-6-85 to 4-7-85	$58,798.00

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LINDA J. GUSTITUS, STAFF DIRECTOR AND CHIEF COUNSEL
MARY BERRY GERWIN, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510-6250

May 29, 1987

The Honorable Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Constitution Avenue and Tenth Street, N.W.
Room 5214
Washington, D.C. 20530

Dear Mr. Cooper:

The Subcommittee on Oversight of Government Management has legislative and oversight responsibility for the Ethics in Government Act and must consider the re-authorization of the Office of Government Ethics (OGE) during this Congress. As part of its continuing review of the executive branch ethics program, the Subcommittee is planning to hold a hearing in late June on compartmentalizations authorized by the OGE under 18 U.S.C. 207(d)(1)(C) and 18 U.S.C. 207(e).

In a 1981 letter to James A. Baker III, then-White House Chief of Staff, the Director of OGE stated that the Executive Office of the President was one "agency" for purposes of 18 U.S.C. 207(c) and noted that the Office of Legal Counsel of the Department of Justice concurred in that conclusion. (See Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee of the Judiciary, House of Representatives, 99th Congress, 2nd session, on H.R. 5097 and Related Bills; May 21 and July 16, 1986, p. 166.)

In order to assist the Oversight Subcommittee in preparation for its hearing, please provide answers to the following questions by June 10, 1987:

1. Does the Office of Legal Counsel of the Department of Justice still concur in its original opinion as noted above?

2. If the position of the Office of Legal Counsel has changed, what is its current position and what is the reason for the change?

3. If the position of the Office of Legal Counsel has changed, has this change been communicated to the Office of Government Ethics, when, and by whom?

In addition, please provide the Subcommittee with all Justice Department documents which describe the Department's current and former position on this matter.

Thank you for your prompt attention to this matter. If you have any questions, please have your staff contact Charlene Simmons of the Oversight Subcommittee staff at 224-3682.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

24 June 1987

Honorable Carl Levin
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Senator Levin:

This responds to your letter of May 29, 1987, to Assistant Attorney General Cooper regarding the position of the Office of Legal Counsel on the status of the Executive Office of the President under 18 U.S.C. 207(c).

Your letter correctly states that the Office of Legal Counsel concurred in the conclusion of the 1981 opinion of the Office of Government Ethics that the Executive Office of the President (EOP) is a single "agency" for purposes of the postemployment rules set forth in section 207(c). This concurrence was sought by OGE in accordance with its obligation under the Memorandum of Understanding between OGE and the Department of Justice to consult with the Office on important matters of first impression. The Office of Legal Counsel has not had the occasion since that time to reconsider the issue, and its 1981 concurrence is therefore still in effect.

It may be helpful to point out that OGE's 1981 opinion is entirely consistent with its subsequent designation, under authority of section 207(e), of "distinct and separate" components of the Executive Office of the President.[1] Indeed, the 1981 opinion itself invited the Executive Office of the President to take the necessary steps to have OGE make such a designation, though the designation itself was not actually accomplished until 1983. The Office of Legal Counsel is ordinarily not asked to comment on OGE designations under section 207(e), and we have no reason to believe that the Office was asked to comment on the designation in this case.

The Office of Legal Counsel's files pertaining to the 1981 OGE opinion reveal that its concurrence was communicated orally to OGE. It was never formally recorded in any written correspondence between the Department and either OGE or the White House.

Sincerely,

John R. Bolton
Assistant Attorney General

[1] Under the statute, such a designation must be based on a determination by OGE that those components "exercise[] functions which are distinct and separate from the remaining functions of the department or agency." See 18 U.S.C. 207(e).

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510-6250

June 3, 1987

The Honorable David H. Martin
Director
Office of Government Ethics
1717 H Street, N.W.
Room 436
Washington, D.C.

Dear Mr. Martin:

The Subcommittee on Oversight of Government Management is planning to hold a hearing in late June on compartmentalizations authorized by OGE under 18 U.S.C. 207(d)(1)(C) and 18 U.S.C. 207(e) as part of the Subcommittee's continuing oversight review of the executive branch ethics program and the upcoming reauthorization of OGE. As you may know, there are several bills before Congress to either partially or completely eliminate OGE's authority to compartmentalize departments and agencies under this statute.

To assist the Oversight Subcommittee in its preparation for this hearing, please provide the following information by June 12, 1987:

1. What standards does OGE use in deciding whether compartmentalization is appropriate under 18 U.S.C. 207(e)?

2. What standards does OGE use to determine whether "no potential for use of undue influence or unfair advantage" exists when approving compartmentalization under 18 U.S.C. 207 (d)(1))C)?

3. Does OGE have the authority to revoke an existing compartmentalization under 18 U.S.C. 207(e) or

207(d)(1)(C)? Has OGE ever revoked an existing compartmentalization? What standards would OGE use to support such a decision and what procedure would be followed?

4. Are determinations under 18 U.S.C. 207(d)(1)(C) restricted to individual employees?

5. Has OGE ever approved a non-statutory compartmentalization which applied to less than five officials? If so, please specify the agency, year, and the number of included positions in each instance. If the compartmentalization(s) applied to only one person, please identify that person, if known.

6. Please provide the Subcommittee with copies of departmental/agency notifications and OGE determinations under 18 U.S.C. 207(d)(1)(C) establishing the following non-statutory compartments:

   a. Department of Commerce: Minority Business Development Administration.

   b. Department of Health and Human Services: Health Care Financing Administration.

   c. Department of Defense: Defense Intelligence Agency and Defense Logistics Agency.

7. Please provide the Subcommittee with copies of departmental and agency notifications and OGE determinations establishing the following statutory compartments under 18 U.S.C 207(e):

   a. National Credit Union Administration: Central Liquidity Facility.

   b. Department of Justice: Independent Counsel.

8. a. How many departmental/agency reports describing positions and recommending special designations for 1985 under 18 U.S.C. 207(d)(1)(C) did OGE receive by May 15, 1986?

Which departments/agencies did not file these reports by the required date, and when were their reports received by OGE?

b. When were the designated positions included in the 1986 list (to be published July 1987) developed by the departments and agencies? How many of these lists refer to positions created or filled in 1985 or earlier?

9. Has OGE ever designated positions under 18 U.S.C. 207(d)(1)(C) for purposes of 18 U.S.C. 207(c) without designating the same positions for purposes of 18 U.S.C. 207(b)(ii)? If so, how many in the last three years? Please specify the positions which currently have differential designations and the reasons underlying such determinations.

10. Have any designations of employees and officials under 18 U.S.C. 207(d)(C) ever been deleted? How many in the last three years, and at whose request?

11. How many notifications have been made to OGE under 5 C.F.R. 737.25(i) in each of the last three years?

12. When do OGE compartmentalizations under 18 U.S.C. 207(e) and 18 U.S.C. 207(d)(1)(C) become effective?

13. When new units are created within the Executive Office of the President (EOP), who is responsible for assigning the units to the proper compartment? Does OGE receive notice as to the assignment and does it review and make a finding as to the validity of the finding?

14. In which EOP components are the Oversight Intelligence Board, the President's Commission on Executive Exchange, and the Office of Planning and Evaluation located?

15. Which positions within the EOP have been identified as having official supervisorial responsibility?

Thank you for your prompt attention to this matter. If you have any questions, please have your staff contact Charlene Simmons of the Oversight Subcommittee staff at 224-3682.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

CL:ljg

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

JUN 25 1987

Honorable Carl Levin
Chairman
Subcommittee on Oversight of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in response to your letter of June 3, 1987, in which you requested information from this Office to assist the Subcommittee on Oversight of Government Management in preparing for a hearing on compartmentalization of agencies under 18 U.S.C. §207(d)(1)(C) and 18 U.S.C. §207(e). Our answers to your questions are as follows:

1. The statute contains a two-part test which the Director must apply in making a determination under 18 U.S.C. §207(e): (1) that there is statutory authority for the proposed component agency; and (2) that the proposed component agency exercises functions that are separate from the other functions of the agency.

With regard to the first element of the test, OGE looks for and recognizes any of the following as statutory authority: a statute, an Executive Order, a Reorganization Plan, or a combination of these authorities. This statutory authority must expressly refer to the functions of the proposed component in such a way as to indicate that it was intended to be a separate component.

As for the second element, we rely on the language contained in the statutory authority and the information the agency provides us as to the component's separateness. In reviewing this information, we look for indications that the functions of the proposed separate component are operationally distinct from the functions of the rest of the agency.

2. In determining whether "no potential for use of undue influence or unfair advantage" exists for purposes of 18 U.S.C. §207(d)(1)(C), OGE applies the standards set forth in 5 C.F.R. §737.13(d)(2). When one component has supervisory authority over another, the two components may not be considered separate and distinct because of the potential for use of undue influence by a former employee based on his interactions as a government employee with the employees at such agencies or bureaus of the parent agency. To make that determination, we review the material submitted by the agency identifying the organizational units of the parent agency which have administrative or operational authority over the proposed component and the agency's description of the nature of the connections and interactions between the proposed component and other agencies, bureaus or offices of the parent agency.

We also consider whether the proposed component has "separate and distinct subject matter jurisdiction." This requirement may be met in at least two ways: (1) the substantive areas of coverage may be distinct; or (2) the regional area of coverage may be different.

OGE's determination that there is no supervisory role and that the subject matter jurisdiction is distinct is not dispositive on the question whether the proposed component should be designated a separate non-statutory component. We also consider the potential for real or apparent undue influence that would exist if the components have a close working relationship.

3. Determinations under 18 U.S.C. §207(e) and (d)(1)(C) rest solely with the Director of the Office of Government Ethics; these prinicples are implemented by 5 C.F.R. §§737.13(c)(2) and (d)(2)(ii). It follows that the right to determine encompasses the right to revoke. The Office of Government Ethics (OGE) has not revoked an existing compartmentalization. However, to support such a decision, OGE would follow the principles set forth in answers (1) and (2). Revocation would be by rule published in the Federal Register.

4. Subsection 207(d)(1)(C) of 18 U.S.C. is an amalgam of concepts which were introduced as an amendment to the Ethics in Government Act in the summer of 1979 (Pub. L. 96-28, June 22, 1979). This section changed the authority of the Director to designate individual "senior employee" positions, raising the level to GS-17 of the General Schedule or SES positions. It also created authority to establish separate non-statutory components with departments or agencies based upon the subject matter jurisdiction of the component.

5. OGE is not aware of any situation in which a separate agency or bureau in which less than five officials serve has been designated a separate non-statutory component for purposes of 18 U.S.C. §207(d)(1)(C). It may be that less than five officials in the component are considered senior employees; however, we know of no such designated components with less than five officials.

6. Attached is enclosure (A), which contains the copies you requested of the available documentation pertaining to the 18 U.S.C. §207(d)(1)(C) determinations for the four non-statutory components that you listed in your letter.

7. Attached is enclosure (B), which contains the copies you requested of the available documentation pertaining to the 18 U.S.C. §207(e) determinations for the two statutory components that you listed in your letter.

8. The senior employee designation process is normally triggered by a letter from OGE to each agency, which attaches a schedule of currently designated positions in the agency. Attached is enclosure (C), which is an example of the typical agency package for the time period in question. You will note, as indicated in the past, we have not adhered to a May 15th reporting date. Also, attached is a copy of the entry log maintained by this Office for that period of time.

With the resources currently available at OGE, it is impossible for us to trace back through the submissions, agency by agency, to determine when each position was initially designated. We do, however, maintain reporting schedules, which have been available to the Committee and which have been reviewed by the General Accounting Office.

9. No.

10. Yes, designations of employees and officials under 18 U.S.C. §207(d)(1)(C) have been deleted. Our files reveal that in the last three years, there have been hundreds of deletions for a variety of reasons, including reorganizations of agencies, the abolition of positions, and changes that place a position that previously required designation into the category of positions automatically considered senior employees. These requests for deletion are initiated by the agency involved.

11. Our files indicate that we receive very few notifications of position switching under 5 C.F.R. §737.25(i). A cursory review of our files for the past three years produced one such notification. In 1986 we received a notification from the Nuclear Regulatory Commission that twelve persons in positions previously designated as senior employee positions had been shifted to undesignated positions as a result of the consolidation of two offices into one organizational unit.

12. Two methods are used to determine effective dates of compartmentalizations under 18 U.S.C. §207(e) and (d)(1)(C). Notification is either contained in the publication of rules in the Federal Register at 5 C.F.R. §§737.31 and 737.32, or agencies are notified by letter from OGE, in which case the effective date is the date of OGE's letter.

13. For the Executive Office of the President (EOP), as for every other agency of the executive branch, the agency must initiate a request for separate compartment treatment. See 5 C.F.R. §§737.13(c)(1) and (d)(1).

14. Pursuant to E.O. 12334, the Intelligence Oversight Board was established within the White House Office, Executive Office of the President. The President's Commission on Executive Exchange has been treated as completely apart from the actual operation of the EOP. We have been advised that the Office of Planning and Evaluation is located in the White House Office.

15. Enclosure (D) contains the list of positions within the EOP which have identified as having official supervisory responsibility and, accordingly, have been designated by this Office as senior employees.

I hope you find this information helpful. Please do not hesitate to contact me if I can be of further assistance to you in this matter.

Sincerely,

David H. Martin
Director

Enclosures (4)

Subcommittee note: Attachments referred to are retained in Subcommittee files.

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510-6250

July 17, 1987

Ms. Rosslyn S. Kleeman
Senior Associate Director
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Ms. Kleeman:

Thank you for testifying before the Senate Governmental Affairs Committee's Subcommittee on Oversight of Government Management at its hearing on post-employment lobbying restrictions. GAO's investigation, report, and testimony on the issue of compartmentalization are of considerable assistance to the Subcommittee in its review of this area.

Several questions arose during the course of the hearing on which GAO may be able to provide additional information. The list of Subcommittee questions is attached.

As soon as the printed hearing record is available, I will see that a copy is sent to you.

Thank you again for your cooperation and assistance to the Subcommittee.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

POST HEARING QUESTIONS FOR GAO

1. Did GAO's review indicate whether OGE has turned down any requests for compartmentalization? If so, how many and in which agencies? Were the requests ultimately approved in the same form, and if not, what changes were made?

2. Has OGE rescinded an existing compartment within a department or agency? If so, please specify the compartment and the parent agency as well as the reason for rescission.

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

AUG 27 1987

The Honorable Carl Levin
Chairman, Subcommittee on
Oversight of Government Management
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

On July 17, 1987, you asked GAO to answer several questions which arose during the course of the Subcommittee's hearing on the compartmentalization of agencies under the Ethics in Government Act. Attached are our answers to those questions. If I can be of additional assistance, please call me at 275-6204.

Sincerely,

Rosslyn S. Kleeman

Rosslyn S. Kleeman
Senior Associate Director

POST-HEARING QUESTIONS AND RESPONSES

Question 1: Did GAO's review indicate whether the Office of Government Ethics (OGE) has turned down any requests for compartmentalization? If so, how many and in which agencies? Were the requests ultimately approved in the same form, and if not, what changes were made?

Answer 1: As mentioned in our report and our testimony, OGE records on the compartmentalization process are incomplete, and therefore may not indicate all instances in which agencies submitted requests for compartmentalization or all instances in which agencies' requests were denied. Nevertheless, our review of those records indicated that OGE denied, deferred, or took no action on at least eight requests for compartmentalization. As of the date of our testimony, three of these requests were not subsequently approved and five were later approved when the requesting agencies provided additional information and/or changed the form of their initial request.

DESIGNATION REQUESTS
NOT SUBSEQUENTLY APPROVED

A. Securities and Exchange Commission (SEC). In a February 8, 1980, letter and a supporting memorandum dated August 21, 1980, the SEC General Counsel recommended that the OGE Director designate 4 operating divisions, 1 support office, and 9 regional offices of the SEC as separate nonstatutory components. On September 9, 1980, the OGE Director notified the SEC General Counsel that these components did not "warrant a finding that there exists no potential for use of undue influence or unfair advantage based on past government service." The SEC has never been divided into subagencies for purposes of the Ethics in Government Act.

B. Department of Justice. On March 27 and May 29, 1980, the Assistant Attorney General for the Office of Legal Counsel at the Department of Justice recommended that 11 units within the Department be designated as nonstatutory components and that 4 other units be designated as a statutory component. On September 9, 1980, the OGE Director approved all but four of the proposed nonstatutory components--the Office of Solicitor General, the Office of Public Affairs, the Office of Legal Counsel, and the Justice Management Division. The Director said that he did not approve these 4 requested compartmentalizations because he believed that the potential for real or apparent undue influence or unfair advantage existed between these units and other divisions within the Department. These units have not since been compartmentalized.

C. Office of Management and Budget (OMB). One other agency's request for designation of a subagency component was never approved. On April 27, 1979, the Office of Management and Budget requested that their Office of Federal Procurement Policy (OFPP) be designated as a separate agency. While OFPP was erroneously listed in the Federal Register as a component of the Office of Personnel Management in 1980, it has never been listed as a component of OMB.[1] According to an OMB official, after OFPP was listed incorrectly, OMB called the error to OGE's attention and assumed that approval for the designation had been granted. OMB later noticed, though, that it was not included in the next published listing of subagency designations. OGE officials said they did not approve the request for designation, and OMB decided not to pursue the matter.

DESIGNATION REQUESTS
SUBSEQUENTLY APPROVED

A. National Credit Union Administration (NCUA). On May 11, 1979, the NCUA General Counsel recommended that OGE designate the agency's Central Liquidity Facility (CLF) as a separate statutory subagency. On May 30, 1979, the OGE Director notified the NCUA General Counsel that, because the CLF was in formative stage and would not be operational until October 1 of that year, OGE would defer action on their request. The OGE Director also said that additional information would have to be added for the request to be approved. On May 14, 1980, the NCUA General Counsel resubmitted their request for statutory designation of the CLF, and provided the additional information the OGE Director had requested.[2] OGE approved the request for designation on May 19, 1981, and the designation became effective on March 5, 1982.

B. Department of Defense (DOD)/Defense Intelligence Agency (DIA). DIA requested the OGE Director to grant statutory compartmentalization from DOD on April 26, 1979. That request was denied on May 4, 1979, by the OGE Director because of what was described as an inadequate presentation of separability of DIA from DOD. The OGE Director also said that OGE expects statutory requests for compartmentalization to be submitted by the parent agency or at least bear the approval and endorsement of the parent agency. OGE records do not contain copies of DIA's or DOD's subsequent request or of OGE's approval, but DIA's

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[1]OMB was, however, subsequently listed as a component of the Executive Office of the President effective March 7, 1983.

[2]While OGE did not have a copy of this resubmission, it was mentioned in OGE's May 19, 1981 approval letter.

compartmentalization was ultimately approved as a nonstatutory subagency and became effective on March 3, 1980, along with other DOD components.

C. DOD/Defense Logistics Agency (DLA). On May 10, 1979, the Director of DLA wrote to the Director of OGE and recommended statutory designation of the agency under the Ethics in Government Act. OGE files indicate that the Director again recommended statutory designation on August 16, 1979. OGE records do not indicate what happened to these requests. On July 8, 1980, the DLA Counsel recommended that DLA be designated as a separate nonstatutory component of DOD, and on April 10, 1981, the OGE Director approved that designation.[3] The designation became effective on March 15, 1984.

D. Department of Health and Human Services (HHS)/Health Care Financing Administration (HCFA). On June 25, 1979, the Acting General Counsel for HHS (then the Department of Health, Education, and Welfare) notified the Director of OGE of his recommendation that HCFA and four other units within HHS be designated as statutory components of the Department for purposes of the Ethics in Government Act. While OGE files do not contain a formal determination of this recommendation, there is a notation in the file from an OGE official recommending that all the units be approved except HCFA. OGE files do not contain any indication of a resubmission or approval by OGE, but HCFA was ultimately designated as a nonstatutory HHS component effective March 3, 1980.

On November 21, 1986, the Designated Agency Ethics Official at HHS requested the OGE Director to designate HCFA as a statutory component of HHS. On December 9, 1986, the OGE Director requested additional information from HHS, noting that their request did not explain how the functions of HCFA are separate from those of HHS and did not identify the statutory basis of HCFA. OGE officials said that they have not received this additional information.

E. Department of Justice. On September 13, 1979, the Assistant Attorney General for the Office of Legal Counsel recommended that nine bureaus and offices, including the U.S. Marshals Service and the U.S. Attorneys Offices, be designated as separate statutory agencies pursuant to the Ethics in Government Act. OGE records do not indicate how this recommendation was resolved, but all the recommended statutory designations were made effective March 3, 1980, except for the U.S. Marshals and U.S. Attorneys, which were designated as nonstatutory subagencies effective that date.

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[3]While OGE did not have a copy of DLA's July 8, 1980 letter, it was mentioned in OGE's April 10, 1981 approval letter.

Question 2. Has OGE rescinded an existing compartment within a department or agency? If so, please specify the compartment and the parent agency as well as the reason for recission.

Answer 2. Our review of OGE records, confirmed by discussions with the OGE Chief Counsel, indicate that OGE has not rescinded the designation of an existing compartment. Any deletions from published listings of OGE designations have been at the request of the department or agency due to abolition of the component.

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510-6250

July 17, 1987

Mr. Joe Whitley
Deputy Assistant Attorney General
Criminal Division
Department of Justice
Constitution Avenue at Tenth Street, N.W.
Washington, D.C. 20530

Dear Mr. Whitley:

The Senate Governmental Affairs Committee's Subcommittee on Oversight of Government Management has a number of questions following the June 25, 1987, hearing on post-employment lobbying restrictions. These questions and requests for additional documentation were raised during the hearing. Also, a White House letter detailing the compartments of various senior officials within the Executive Office of the President, which was referred to during the hearing, is enclosed for your review and comment.

The list of Subcommittee questions is attached. Please provide the requested information by July 31, 1987. If you have any questions, please have your staff contact Linda Gustitus at 224-3682. Thank you for your attention to this important matter.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

CL:ljg
Enclosures

POST HEARING QUESTIONS FOR THE DEPARTMENT OF JUSTICE

1. Why are the U.S. Attorney's offices separate compartments? On what basis are they considered "separate and distinct" from the rest of the Department of Justice, and how does this scheme carry out the statutory purpose? Please provide the Subcommittee with copies of letters to OGE concerning the compartmentalization request and any supporting or background Department of Justice documents.

2. Why is the Civil Division not listed as a compartment of the Department of Justice in the 1987 Code of Federal Regulations? If the Civil Division was omitted by error, please detail the source and timing of the error, and provide the Subcommittee with copies of letters to OGE requesting compartmentalization as well as any supporting or background Department of Justice documents.

3. Does the Department of Justice regard the Independent Counsel as a separate compartment? What was the basis for seeking that office as a separate compartment? Please provide the Subcommittee with any documentation requesting or supporting this compartmentalization.

4. A copy of a letter from the White House to the Subcommittee is enclosed. A number of questions were raised during the hearing concerning various positions within the Executive Office of the President, which compartment they fall within, and the uncertain application of 18 U.S.C. 207 in these instances. In particular, please address the statutory application for the position of Assistant to the President for National Security Affairs, and the Chief of Staff to the Vice President (who also serves as Assistant to the Chief of Staff of the President and is on the White House payroll). Where do incumbents of these positions fit within the statutory scheme and what post-employment prohibitions apply to them?

5. Should Congress eliminate compartmentalization as an option under 18 U.S.C. 207?

6. Please provide the Subcommittee with the Department's comments on S. 237.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

1988

Honorable Carl Levin
Chairman
Subcommittee on Oversight of
Government Management
Committee on Government Affairs
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

Please find attached responses to the follow-up questions you and Senator Cohen posed to the Department following Deputy Assistant Attorney General Whitley's testimony on June 25, 1987, regarding post-employment lobbying restrictions.

Do not hesitate to contact me if you have additional questions.

Sincerely,

John R. Bolton
Assistant Attorney General

QUESTION 1: Why are the U.S. Attorney's offices separate compartments? On what basis are they considered "separate and distinct" from the rest of the Department of Justice, and how does this scheme carry out the statutory purpose? Please provide the Subcommittee with copies of letters to OGE concerning the compartmentalization request and any supporting or background Department of Justice documents.

ANSWER: The Offices of United States Attorneys have not been designated as separate statutory components under 18 U.S.C. 207(e), since the Office of Government Ethics does not consider their functions to be "separate and distinct" from those of the rest of the Department. The components of the Department that have been so designated, which include the FBI and DEA, are listed in 5 C.F.R. 737.31. OGE has, however, given each of the U.S. Attorneys' Offices the more limited designation available under 18 U.S.C. 207(d)(1)(c) for components of an agency whose subject matter jurisdiction is separate and distinct from the rest of the Department. Similar so-called "non-statutory component" designations have been given to the litigating divisions of the Department such as the Tax Division, the Criminal Division, etc., but not to entities within the Department with a more general mandate, such as the Office of the Solicitor General and the Office of Legal Counsel. These "non-statutory components" of the Department are listed in 5 C.F.R. 737.32.

The effect of OGE's designation of U.S. Attorney Offices as "non-statutory components" is that covered personnel in each

United States Attorneys Office -- except for the United States Attorney himself -- may make post-employment contacts with other similarly designated non-statutory components (i.e., the Department's litigating divisions), as well, of course, as the separate statutory components. However, they may not contact any part of the "parent" Department, or, of course, their own former office.

In designating the United States Attorneys Offices as separate non-statutory components, OGE determined that the limited kinds of postemployment contacts that would be permitted by its designation would involve "no potential for use of undue influence or unfair advantage based on past government service." See 18 U.S.C. 207(d)(1)(C). The United States Attorney himself reaps no benefit from the designation of his Office as a nonstatutory component, and is barred for one year from contacting any part of the Department except the components that have been designated under section 207(e) as separate statutory components.

QUESTION 2: Why is the Civil Division not listed as a compartment of the Department of Justice in the 1987 Code of Federal Regulations? If the Civil Division was omitted by error, please detail the source and timing of the error, and provide the Subcommittee with copies of letters to OGE requesting compartmentalization as well as any supporting or background Department of Justice documents.

ANSWER: The Civil Division has been designated by OGE as one of the Department's separate "non-statutory" components. See enclosed OGE letter dated September 9, 1980. It was apparently inadvertently omitted from the list published by OGE in the Code of Federal Regulations.

QUESTION 3: Does the Department of Justice regard the Independent Counsel as a separate compartment? What was the basis for seeking that office as a separate compartment? Please provide the Subcommittee with any documentation requesting or supporting the compartmentalization.

ANSWER: OGE designated the Office of Independent Counsel as a separate statutory component of the Department of Justice in 1985. The Department of Justice was not involved in this process, and indeed appears to have been entirely unaware of it.

QUESTION 4: A copy of a letter from the White House to the Subcommittee is enclosed. A number of questions were raised during the hearing concerning various positions within the Executive Office of the President, which compartment they fall within, and the uncertain application of 18 U.S.C. 207 in these instances. In particular, please address the statutory application for the position of Assistant to the President for National Security Affairs, and the Chief of Staff to the Vice President (who also serves as Assistant to the Chief of Staff of the President and is on the White House payroll). Where do incumbents of these positions fit within the statutory scheme and what postemployment prohibitions apply to them?

ANSWER: We are not in a position to respond substantively to this question, because we do not have sufficient factual information about the positions in issue.

QUESTION 5: Should Congress eliminate compartmentalization as an option under 18 U.S.C. 207?

ANSWER: The Department of Justice has taken no position on this policy issue.

QUESTION 6: Please provide the Subcommittee with the Department's comments on S. 237.

ANSWER: The Department is drafting a letter to Vice President Bush, President of the Senate, commenting in detail on S. 237. When it has been cleared by the Office of Management and Budget and forwarded to Mr. Bush, we will be pleased to provide the Subcommittee with a copy.

United States of America
Office of Government Ethics

Office of Personnel Management
Washington, D.C. 20415

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OFFICE OF LEGAL COUNSEL

9 1980

Honorable John M. Harmon
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D. C. 20530

Dear Mr. Harmon:

Your memoranda of March 27, and May 29, 1980 recommended that 11 operating units within the Department of Justice be designated as "separate non-statutory components" under the provisions of 18 U.S.C. §207(d)(1)(C), and that four other operating units be designated as separate statutory agencies under the provisions of 18 U.S.C. §207(e). This letter presents our decisions.

We have reviewed your recommendations and supporting materials, and have concluded that the following named divisions/offices within the Department of Justice meet the requirements for designation as "separate" agencies/components:

Separate Non-Statutory Components (section 207(d)(1)(C))

Antitrust Division
Civil Rights Division
Land and Natural Resources Division
Tax Division
Civil Division
Criminal Division
Office for Improvements in the Administration of Justice

Separate Statutory Agencies (section 207(e))

Law Enforcement Assistance Administration (LEAA)
National Institute of Justice (NIJ)
Bureau of Justice Statistics (BJS)
Office of Justice Assistance, Research and Statistics (OJARS)

The Office of Solicitor General (OSG), the Office of Public Affairs (OPA), the Office of Legal Counsel (OLC) and the Justice Management Division (JMD) are not included among those operating units that will be designated as separate non-statutory agencies.

You note in your memorandum of March 27, 1980 that certain connections and interactions exist between OSG and the litigating divisions, primarily with the lawyers of the divisions who handle cases above the trial level, but that OSG does not supervise the divisions or their appellate sections.

That OSG does not supervise the litigating divisions or their appellate sections is not dispositive of the question whether OSG should be designated a separate non-statutory component. As you know, the legislative history concerning the amendments to the Ethics in Government Act of 1978 which provided the Director, Office of Government Ethics the authority to limit the application of §207(c) by designating non statutory components provides that such designations be made infrequently. The legislative history further provides that, in those limited cases where the authority to so designate is exercised, it was to apply to large and significant parts of the Department which are unrelated and which do not work together closely. Further, in those cases, the Director, OGE must first determine that such bureau or agency has separate and distinct subject matter jurisdiction and that there is no potential for real or apparent undue influence or unfair advantage. (Emphasis added)[1]

Although this Office does not dispute the fact that OSG and the litigating divisions have separate subject matter jurisdiction, we do believe that the potential for real or apparent undue influence or unfair advantage exists because OSG attorneys would, from time to time, work closely with attorneys from the various litigating divisions and vice versa. Accordingly, we have determined that OSG should not be designated as a separate non-statutory agency for purposes of 207(c).

Essentially the same type of close working relationship appears to exist with regard to OPA, OLC, JMD and other offices and divisions within the Department. Accordingly, this Office does not concur in the recommendation to designate these operating units as separate non-statutory components.

In accordance with your recommendation, the designation of LEAA, NIJ, BJS and OJARS will be qualified in that such units will not be considered separate from each other but only from other separate components of the Department.

This Office will issue a rule amending 5 C.F.R. 737.31 and 737.32 and designating the aforementioned divisions, offices and bureaus within the Department of Justice as separate agencies/components for purposes of the "no contact" provision of §207(c) of title 18 U.S.C., as amended. We anticipate that such rule will be issued simultaneously with the annual amendments to 5 C.F.R. 737.33 (Senior Employee designations).

Should you have any questions concerning the foregoing proposed action, please do not hesitate to contact this Office.

Sincerely,

J. Jackson Walter

J. Jackson Walter
Director

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[1] 125 Cong. Rec. 57660 (daily ed. June 14, 1979) (remarks of Senator Ribicoff).

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510-6250

June 9, 1987

Arthur B. Culvahouse, Jr.
Counsel to the President
White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. Culvahouse;

The Subcommittee on Oversight of Government Management is planning to hold a hearing in late June on compartmentalizations authorized by the Office of Government Ethics (OGE) under 18 U.S.C. 207(d)(1)(C) and 18 U.S.C. 207(e), and related post-employment issues. The hearing is part of the Subcommittee's continuing oversight review of the executive branch ethics program and the upcoming reauthorization of OGE. As you may know, there are several bills before Congress to either partially or completely eliminate OGE's authority to compartmentalize departments and agencies for purposes of the one year no-contact ban established by 18 U.S.C. 207(c).

To assist the Oversight Subcommittee in its preparation for this hearing, please provide the following information by June 17, 1987:

1. When new units are created within the Executive Office of the President (EOP), who is responsible for assigning the units to the proper compartment?

   a. What standards are used in making these determinations and what is the process by which the decision is made?

   b. Is OGE consulted either before or after the assignment has been made?

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2. How many new units have been created in the EOP since it was compartmentalized for purposes of 18 U.S.C. 207(c)? Please name the units, their assigned compartments, and include any findings supporting the assignments.

3. Has the White House Counsel's office considered whether the separability of functions among EOP's components could be clarified and improved by a different compartmentalization scheme?

   a. What changes in the present compartmentalization scheme would you recommend?

4. Which positions within the EOP have been identified as having official supervisorial responsibility?

5. In your opinion, are all of the positions involving "significant decision-making or supervisory responsibility" in the EOP presently included within the Executive Level pay scale?

   a. If not, how should the defined range be changed to accomodate the required positions?

   b. Why aren't any positions within the White House currently designated under 18 U.S.C. 207(b)(1)(C)?

6. What are the present requirements for obtaining a White House pass, and what privileges does possession of a pass entail?

   a. Have there been any changes in these requirements or privileges within the last two years?

   b. Please provide the Subcommittee with any guidelines or standards detailing the use and termination of White House passes which have been issued in the last two years.

7. How many current White House employees have White House passes?

8. How many former White House employees have White House passes? Please specify their names and former positions.

9. What were David Fischer's responsibilities and duties as a Special Assistant to the President?

10. When was Craig Fuller appointed as an Assistant to the Chief of Staff to the President?

11. What were Roger Porter's titles when he served in the EOP and which office paid his salary?

12. Please specify the procedures by which you, as White House DAEO, inform retiring officials of their obligations under 18 U.S.C. 207 (including meetings and notifications), and provide the Subcommittee with any related documents which may be provided to those officials.

13. Who, if anyone, is responsible for monitoring post-employment contacts made by former White House staff?

    a. Is there a formal reporting method by which such contacts are to be brought to the attention of the relevant officials?

    b. How many such contacts have been reported in the last year, and by whom?

    c. How many of such contacts have been reported to OGE in the last year? To the Department of Justice?

Thank you for your prompt attention to this matter. If you have any questions, please have your staff contact Charlene Simmons of the Oversight Subcommittee staff at 224-3682.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

CL:ljg

THE WHITE HOUSE

WASHINGTON

June 24, 1987

Dear Mr. Chairman and Senator Cohen:

Thank you for your correspondence of June 9, 1987, in which you requested certain information regarding administrative and ethics matters within the Executive Office of the President. I understand that the Senate Subcommittee on Oversight of Government Management will be holding hearings concerning these matters, and I am happy to assist you and the other members of the subcommittee by responding to your inquiries.

I wish at the outset to make one clarification. I am not, as your letter stated, the Designated Agency Ethics Official for the Executive Office of the President. The term "Executive Office of the President" refers to a grouping of nine separate statutory agencies: the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Office of the United States Trade Representative, the Council on Environmental Quality, the Office of Science and Technology Policy, the Office of Administration, the White House Office and the Office of the Vice President. There is a Designated Agency Ethics Official for each of these agencies. I serve as Designated Agency Ethics Official for the White House Office only. Consequently, my responses are for the most part necessarily limited in scope to matters relating to the White House.

I have set forth below factual information responsive to the inquiries made in your letter. These responses are numbered so as to correspond to your numbered questions.

1-2. As noted above, the term "Executive Office of the President" refers to a collection of nine separate government agencies. Under 18 U.S.C. § 207(e), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency "exercises functions which are distinct and separate from the remaining functions of the department or agency," that agency must be so designated.

The significance of such designations lies in the application of the post-employment restrictions embodied in 18 U.S.C. § 207(c). That provision prohibits particular categories of former government employees from certain representational activities before

the agency in which they previously served, for a period of one year following their departure. When a separate statutory agency or bureau is designated by the Director of the Office of Government Ethics, it is with respect to that agency, and not the larger entity to which it may be attached, that these post-employment restrictions apply. Such designations do not, however, affect those former employees who had supervised one of the statutory agencies. The one-year bar applies to those employees with respect to representational activities before the entire umbrella department or agency.

You inquired about the procedures surrounding the creation of new "units" within the Executive Office of the President and about how those "units" are assigned to their "proper compartment." Under 18 U.S.C. § 207(e), it is the Director of the Office of Government Ethics who designates separate statutory agencies. In March 1983, the Acting Director of the Office of Government Ethics designated nine separate statutory agencies within the Executive Office of the President pursuant to 18 U.S.C. § 207(e):

- Office of Management and Budget
- Council of Economic Advisers
- National Security Council
- Office of the United States Trade Representative
- Council for Environmental Quality
- Office of Science and Technology Policy
- Office of Administration
- White House Office and the Office of Policy Development
- Office of the Vice President

The regulations implementing these designations are located at 5 C.F.R. § 737.31 (1987). No new designations have been made since 1983.

Our office had proposed that the Office of Policy Development, the successor to the original Domestic Council, be designated as a separate agency as well. The Acting Director of the Office of Government Ethics declined to do so, and the Office of Policy Development has therefore been classified as part of the White House Office.

When the head of a separate statutory agency, such as the Director of the Office of Management and Budget, reorganizes his agency so as to create a new office or division, employees who work in that new office or division are still considered to be part of that separate agency -- in this example, the Office of Management and Budget -- for purposes of enforcing the post-employment restrictions of 18 U.S.C. § 207(c). While many internal reorganizations may have taken place during this Administration within the agencies which comprise the Executive Office of the President, any new "units" that may have been established in this process are classified for purposes of 18 U.S.C. § 207(e) as part of the agency in which they were established.

In addition, the Congress itself occasionally establishes new entities within the Executive Office of the President. Two recently enacted statutes have established new entities within the Executive Office of the President: the White House Conference for a Drug Free America (P.L. 99-570) and the National Critical Materials Council (P.L. 98-373). While no designation of these entities has yet been made by the Office of Government Ethics, the White House Conference for a Drug Free America would presumably be classified for post-employment purposes within the White House Office, as its name suggests. The proper classification of the National Critical Materials Council is less obvious, and we intend to review its status and functions with the Office of Government Ethics in order to determine whether it should be designated as a separate statutory agency under 18 U.S.C. § 207(e) or, instead, placed for post-employment purposes within one of the existing agencies.

3. As noted above, the Office of the Counsel to the President had originally proposed the designation of ten, rather than nine, statutory agencies within the Executive Office of the President. The Director of the Office of Government Ethics did not adopt this recommendation, and we accept his determination. This Office has proposed no other revisions in the existing designations.

4-5. You further inquired concerning the designations under 18 U.S.C. § 207(d)(1)(C) of positions which involve significant decision-making or supervisory responsibilities within the Executive Office of the President. As Designated Agency Ethics Official for the White House Office only, I am not in a position to address this question with respect to any other agency.

The one-year post-employment restriction described in 18 U.S.C. § 207(c) applies only to those former employees who fall into the three categories listed in 18 U.S.C. § 207(d). These categories are:

- former employees who served at a rate of pay specified in or fixed according to subchapter II of Chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

- former employees who served on active duty as commissioned officers of one of the uniformed services assigned to pay grades of 0-9 or above as described in section 201 of title 37, United States Code; and

- former employees who held positions designated by the Director of the Office of Government Ethics under 18 U.S.C. § 207(d)(1)(C). Such positions must involve "significant decision-making or supervisory responsibility" and be paid at or above certain specified pay levels.

Designations under 18 U.S.C. § 207(d)(1)(C) are limited to positions for which the basic rate of pay is equal to or greater than the basic rate of pay for GS-17 of the General Schedule prescribed by 5 U.S.C. § 5332, positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay 0-7 and 0-8 as described in 37 U.S.C. § 201. All positions within the White House Office for which the basic rate of pay is equal to or greater than the basic rate of pay for GS-17 are already covered by 18 U.S.C. § 207(d)(1)(A). Hence, there has been no need for discretionary designations under 18 U.S.C. § 207(d)(1)(C), since all eligible positions are already covered by the mandatory provision of 18 U.S.C. §207(d)(1)(A).

6-8. The principal function of security passes issued by the Secret Service to personnel working in the White House complex (which includes the Old Executive Office Building) is to protect the President from any possible embarrassment or harm. Passes are required for access to and from those portions of the complex to which personnel must have access in order to perform their duties. Permanent passes are issued only after security requirements have been fully satisfied. All current White House Office employees have security passes. Passes are generally terminated when employment terminates. At present, no former White House Office employees have White House complex passes.

9. As Special Assistant to the President, Mr. David Fischer was responsible for seeing that the President kept his appointments in a timely manner. His duties included traveling with the President at all times, notifying the President when appointments had arrived, annotating the President's schedule for historical purposes, and ensuring that materials and arrangements for a Presidential meeting were organized appropriately.

10. Mr. Craig Fuller was appointed as an Assistant to the Chief of Staff on June 9, 1985.

11. Mr. Roger Porter served as Deputy Assistant to the President for Policy Development and Director of the Office of Policy Development. His salary was paid by the White House Office.

12-13. Enclosed with this letter is a copy of the current version of a memorandum that has routinely been provided to prospective employees in the White House Office who are subject to the post-employment restrictions of the Ethics in Government Act. In addition to provision of this advice, my office routinely answers inquiries from current and former White House personnel concerning their obligations under 18 U.S.C. § 207, seeking guidance from the Office of Government Ethics where necessary. The Office of the Counsel to the President is generally responsible for quasi-legal administrative duties relating to standards of conduct and conflicts of interest.

I hope this information proves helpful to the Subcommittee.

Sincerely,

Arthur B. Culvahouse, Jr.
Counsel to the President

Enclosure

The Honorable Carl M. Levin
Chairman
The Honorable William S. Cohen
Ranking Minority Member
Committee on Governmental Affairs
Subcommittee on Oversight of
Government Management
United States Senate
Washington, D.C. 20510-6250

Subcommittee note: Enclosure referred to
is retained in Subcommittee files.

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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510-6250

July 17, 1987

The Honorable David H. Martin
Director
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

Dear Mr. Martin:

The Senate Governmental Affairs' Subcommittee on Oversight of Government Management has a number of questions for OGE following its June 25, 1987, hearing on post-employment lobbying restrictions. In addition, several important points raised during the hearing require documentation.

The list of Subcommittee questions and requested documents is attached. Please provide the requested material by July 31, 1987. If you have any questions, please have your staff contact Linda Gustitus at 224-3682. Thank you for your attention to this important matter.

Sincerely,

Carl Levin
Chairman

William S. Cohen
Ranking Minority Member

CL:ljg

Enclosure

POST HEARING QUESTIONS FOR OGE

1. Did OGE notify all the departments and agencies of its decision to not unilaterally designate compartments and of their consequent responsibility to initiate requests for such designations? If so, please provide the Subcommittee with a copy of such notice.

2. Please provide the Subcommittee with the letter(s) from former White House Counsel Peter Wallison to OGE pertaining to OGE's recent review of the compartmentalization of the Executive Office of the President. In addition, please provide the Subcommittee with any written OGE analysis regarding this compartmentalization, and any other recent letters or memos on the topic.

3. How many requests for compartmentalization has OGE refused? Please specify both the compartment and the requesting department or agency. What was the basis for each refusal, and what was OGE's ultimate disposition of the request? Please include copies of any correspondence, OGE memos and written analysis.

4. Has OGE ever concurred with a departmental or agency request for compartmentalization on the basis of statutory classification, but refused that same request because the functions weren't separate and distinct? If so, please specify the compartments and the agency(s) and provide the Subcommittee with copies of the correspondence from the agency and OGE as well as any internal evaluative memoranda.

5. OGE is conducting an "on-going analysis" of the compartmentalization scheme at the Department of the Treasury, according to your testimony at the hearing. Which compartments are under review, and what is the nature of the "dispute" between Treasury and OGE regarding these compartments? How did this dispute arise, and what standards is OGE applying to reach a resolution?

6. During the hearing, there was some discussion concerning the position and role of the Assistant to the President for National Security Affairs. Please specify which compartment your subsequent research indicates this position is included within and what lobbying prohibitions apply to its incumbent. How does this

scheme fit within the statutory purpose envisioning "separate and distinct" compartments?

7. Which compartment does Craig Fuller, Chief of Staff to the Vice President and Assistant to the Chief of Staff to the President, fall under? Mr. Fuller is shown as being on the White House payroll. Who is responsible for determining the compartment of incumbents with similar dual positions, and how and by whom are those individuals advised regarding post-employment restrictions?

8. Why is the Civil Division not listed as a compartment of the Department of Justice in the 1987 Code of Federal Regulations?

9. Please provide the Subcommittee with any correspondence to and from the Department of Justice regarding the compartmentalization of its components, including the Civil Division and the U.S. Attorneys and any OGE memos or written analysis.

10. Which compartmentalization schemes approved by OGE do not identify supervisorial officials in their requesting letters? How else have such officials been identified and notified of their status? Please provide the Subcommittee with representative copies of these identifications and notifications.

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

AUG 4 1987

The Honorable Carl Levin
Chairman
Subcommittee on
Oversight of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in response to your July 17, 1987 letter, in which you requested our response to a series of post-hearing questions on the post-employment restrictions. Our answers follow:

1. OGE notified all the departments and agencies of its view that the agency must initiate requests for designations of separate statutory and nonstatutory components. This notice went out in two forms, copies of which are contained in Attachment A:

i. a memorandum of April 6, 1979 from Bernhardt K. Wruble, Director, Office of Government Ethics, to Heads of Departments, Independent Agencies and Government Corporations/Designated Agency Ethics Officials.

ii. by regulation at 5 C.F.R. § 737.13(c)(i), which was originally published in February of 1980.

2. Attachment B contains the correspondence between this Office and the Executive Office of the President regarding OGE's recent review of the compartmentalization of the Executive Office of the President. Also included are internal memoranda regarding the Office's analysis of this matter.

3. Our review of our files indicates that we have denied requests from two agencies to designate separate nonstatutory components and four agencies' requests to designate separate statutory components. (See Attachment C.)

In March 1980, the Department of Justice (DOJ) requested the following nonstatutory agencies: Office of Solicitor General, Office of Legal Counsel, Justice Management Division and the Office of Public Affairs. OGE denied this request.

In February 1980, the Securities and Exchange Commission (SEC) recommended nonstatutory designations for four operating divisions, one support office, and nine regional offices. OGE denied this request by letter dated September 9, 1980.

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March 1988

The National Credit Union Administration recommended for separate statutory designation its Central Liquidity Facility (CLF). In May 1979, OGE stated that it would not act on that until the CLF became operational. OGE later designated the CLF as a separate statutory agency.

The former Department of Health, Education and Welfare recommended that we designate the Health Care Financing Administration (HCFA) as a separate statutory component. We denied that request, but later designated it as a separate nonstatutory agency.

In 1986, the Department of Health and Human Services sought to have the HCFA designated as a separate statutory agency. By letter dated December 9, 1986, this Office requested additional information. We have not yet received the requested information and have not made a determination as to whether to make the designation.

In September 1979, the Department of Justice requested that we designate the United States Attorneys Offices and the United States Marshals Service as separate statutory components. We denied this request. The United States Attorneys Offices and the United States Marshals Service were later designated as nonstatutory components.

4. It is not clear from our files whether this Office has ever concurred with the agency's request on the basis of statutory classification but refused that same request because the functions weren't separate and distinct. In the case of any of the requests for separate statutory designation that we denied, this was a possible basis.

5. Earlier this year the Department of the Treasury submitted a request for the designation of three Treasury bureaus, the Bureau of the Public Debt, the Financial Management Service (FMS), and the Federal Law Enforcement Training Center, as separate statutory components. There was no "dispute" between OGE and the Treasury on this matter. After Treasury made its original submission, we requested additional information. Upon receiving that information, we designated the Bureau of the Public Debt and the FMS as separate statutory components. As we stated in our July 14, 1987 letter to Treasury, we did not find sufficient statutory basis for designating the Training Center.

Our analysis of this matter is contained in our July 14, 1987 letter, a copy of which is included in Attachment D.

6. Regarding the Assistant to the President for National Security Affairs, it is our understanding that the Assistant to the President is considered a member of the separate statutory agency described as the White House Office. Assuming that position is an Executive Level position and thereby automatically considered a Senior Employee position for the purposes of 18 U.S.C. § 207(c), then the Assistant would be restricted from contacting his former agency, the White House Office, for one year following his departure from that position.

It is possible that the Assistant would also be subject to restrictions on contacts with the National Security Council and its staff. Under 18 U.S.C. § 207(e), the designation of a separate statutory agency for purposes of limiting the scope of the subsection 207(c) restriction "shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau." As a result, if the Assistant to the President for National Security Affairs exercises supervision over the

National Security Counsel, then he or she is also restricted from attempting to influence the National Security Counsel and its staff for one year after leaving the government. There would not, however, be any restriction on his contacting the other separate statutory agencies, except the White House Office as discussed above, and the parent EOP.

7. The answer to your question regarding which compartment the Chief of Staff to the Vice President and Assistant to the Chief of Staff falls into must follow the analysis set forth in 5 C.F.R. § 737.13(c)(3) as discussed above. The responsibility for determining the compartment in which a Senior Employee belongs rests with the agency and its Designated Agency Ethics Official. The Designated Agency Ethics Official is also responsible for advising the agency's employees concerning the post-employment restrictions. As stated at 5 C.F.R. § 737.1(c)(6), "[d]epartments and agencies have primary responsibility for the administrative enforcement of the post-employment restrictions found in the Act."

8. The Civil Division of the Department of Justice (DOJ) has been designated as a separate nonstatutory component of DOJ. It was listed in the Federal Register when it was initially designated but was inadvertently left out in subsequent years. This will be corrected in our next publication of the designations.

9. Attachment E contains any correspondence between OGE and DOJ that was not already provided under question #3 regarding the compartmentalization of its components, and OGE's memos or written analysis on the matter.

10. In their requests for designation under 18 U.S.C. § 207(e), agencies must identify those positions in the parent agency with official responsibility for supervision of such separate statutory agency or bureau. (See 5 C.F.R. § 737.13(c)(iii)). All of this communication is in terms of positions and not actual names of individuals who are serving in those positions. As a result, this Office does not individually notify the supervisory employees of their status. That is the Designated Agency Ethics Official's responsibility. We do, however, publish annually at 5 C.F.R. § 737.31 through § 737.33 the lists of the separate statutory and nonstatutory components of agencies and the list of designated Senior Employees. We are not, however, aware of which employees at each agency are automatically deemed Senior Employees by virtue of their high-level positions. That information is never communicated to this Office and notification of those employees must be handled completely by the agency involved. (See Attachment F for an example of the type of information OGE receives regarding supervision of the statutory agency and component and our most recent listing of designated components and designated Senior Employees.)

We hope you find this information helpful.

Sincerely,

David H. Martin
Director

Attachments

Subcommittee note: Attachments retained in Subcommittee files.

Congressional Research Service
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Washington, D.C. 20540

June 19, 1987

TO : Senate Governmental Affairs Committee
Subcommittee on Government Management
Attention: Charlene Simmons

FROM : American Law Division

SUBJECT: Senior Government Officials Who Come Within Certain "Revolving Door" Restrictions

This memorandum is submitted in response to the committee request as discussed with Charlene Simmons for information and an interpretation as to which civilian "senior officials" of the federal government would come within the so-called one-year "cooling off" or "no contact" provision of the post-employment, conflict of interest law at 18 U.S.C. § 207(c).

The restriction in question generally prohibits high level federal officials, for one year after leaving government service, from making representations, or communications intended to influence, to or before the agency or department in which the former official had been employed. 18 U.S.C. § 207(c). This restriction, as set out in pertinent part in the statute at 18 U.S.C. § 207(d)(1), applies to:

> ... [A] person employed--
> (A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;
>
> * * *
>
> (C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the

> Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraph (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS-17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978 or positions of active duty commissioned officers of the uniformed services assigned to pay O-7 or O-8, as described in section 201 of title 37, United States Code, may be designated.

Under the law civilian employees would either be covered "automatically" by statute by virtue of their rate of pay in the Executive Schedule or a comparable rate "under other authority," § 207(d)(1)(A); or be covered by "designation" by the Office of Government Ethics by virtue of their duties, non-coverage under (A), and their rate of pay if it is at least that of a GS-17 or is in the Senior Executive Service. § 207(d)(1)(C).

As stated in the law, those covered automatically by operation of the statute are persons employed "at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority." (Emphasis added) Chapter 53, subchapter II, of 5 U.S.C. sets out the "Executive Schedule" pay rates, and is divided into five pay levels, level I through level V. See 5 U.S.C. § 5311 et seq. The current rate of pay for these levels begins at $72,500 for level V, and goes up to $99,500 for level I.

There is a question as to which groups of employees compensated at "a comparable or greater rate of pay under other authorities" were intended to come within the "automatic" coverage of subsection (A). It may be noted that persons who are compensated in the General Schedule (GS), at a GS-16, step 6 and above, including all GS-17's and GS-18, are currently designated at

a rate of pay higher than a level V of the Executive Schedule, but because of the "pay cap," are limited to receiving an amount which is equal to a level V, that is, $72,500. (Note 5 U.S.C. § 5308) Such person might arguably, therefore, be employed at a "rate of pay under other authority" which is "comparable" to that in the Executive Schedule, subchapter II, chapter 53 of title 5, U.S.C. Similarly, persons paid in the Senior Executive Service at a rate of ES-4 ($73,400) to ES-6 ($77,500) would also be receiving a rate of pay comparable or greater than that paid at a Level V of the Executive Schedule. Although there is thus an interpretation of the statutory language of section 207(d)(1)(A) which on its face might imply that all such persons are automatically covered, it is not clear from the legislative history that this was, in fact, the intent of Congress.

An employee who is "automatically" covered in subsection (A) may not be designated by the Director of OGE under subsection (C). Those civilian employees who may be designated as senior officials by the Director of OGE under subsection (C) of section 207(d)(1) may include only those in positions which are not covered under subsection (A), those which are compensated at a rate equal to or greater than positions in the General Schedule at GS-17 or above, or are in the Senior Executive Service, and those which have "significant decision making or supervisory responsibility."

The language of section 207(d)(1)(A) as to those persons who receive a rate of pay comparable to those in the Executive Schedule but under a different authority is thus somewhat ambiguous as to its coverage. Although one interpretation of the plain meaning of the statutory language could arguably support a conclusion that any employee in the government receiving a rate of pay under any authority which is in excess of or equal to the lowest rate in

the Executive Schedule would be covered by the automatic coverage provisions, a more restrictive interpretation that those persons who are in the General Schedule were intended by Congress to be covered only when specifically designated by the Director of OGE under section 207(d)(1)(C) is also a reasonable interpretation.

It is well established that the starting point for interpretation of a statute is the language of the law itself. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983). The plain and ordinary meaning of the words used in a law will control its interpretation, Malat v. Riddell, 383 U.S. 569 (1966); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1963), reh'g denied 425 U.S. 986; Perrin v. United States, 444 U.S. 37 (1979), "absent a clearly expressed legislative intention to the contrary." C.P.S.C. v. GTE Sylvania, Inc., supra at 108; North Dakota v. United States, 460 U.S. 300, 312 (1983); Aaron v. Securities Exchange Commission, 446 U.S. 680 (1980). The intent of the legislature is of course of principal importance in determining the meaning of a law, Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962); Philbrook v. Glodgett, 421 U.S. 707 (1975), and that intent, when not obvious from the statutory language, may be determined from the provision's legislative history. Blum v. Stenson, 465 U.S. 886 (1984); Motor Vehicle Ass'n of U.S., Inc. v. Environmental Protection Agency, 768 F.2d 385 (D.C. Cir. 1985), cert. denied 106 S. Ct. 852 (1986).

The original Ethics in Government Act amendments to the "revolving door" provisions of 18 U.S.C. § 207, added the additional "cooling off" period of 18 U.S.C. § 207(c), applicable to senior level government officials. P.L. 95-521, Title V, October 26, 1978. The officials to whom the provisions of the one-year cooling off period were applicable at that time included:

1. Persons paid on the Executive Schedule "or a comparable or greater rate of pay under other authorities";

2. Persons paid at a rate equal to or greater than a GS-17, and who have "significant decision making authorities" as "designated by the Director of the Office of Government Ethics";

3. Persons on active duty as a commissioned officer at a pay grade of O-7 or above; or

4. Persons in any position, and at any rate of pay, who are designated by the Director of OGE.

It should be noted that at the time of passage of these provisions of the Ethics in Government Act to amend 18 U.S.C. § 207 in 1978, persons who were compensated at a rate of GS-17 were receiving compensation equal to that of a person at level V of the Executive Schedule (See 5 U.S.C.A. § 5332, note, 1980 Ed.; E.O. 12087, October 7, 1978), and yet Congress established separate coverage for persons (1) on the Executive Schedule or at a comparable rate of pay, who are automatically covered on the one hand, and (2) those compensated at a GS-17 or above who are covered by designation by the Director of OGE on the other. The Conference Report on the final language adopted by the 95th Congress does not provide assistance in determining the legislative intent of these coverage provisions. S. Doc. No. 95-127, 95th Congress, 2d Session (1978). However, in considering amendments to the 1978 provisions the next year (P.L. 96-28), floor statements by Members and statements by the administration agree that it was Congress' intention to cover "automatically" only those being compensated at rates established in or according to the Executive Schedule, while requiring those in a GS-17 or above position to be "designated" by the Director of OGE. In testimony to Congress, Alan K. Campbell, the Director of the Office of Personnel Management stated:

> Section 2-7(d) of the Act lists several categories of individuals who are to be made subject to the special restrictions for Senior Employees .... The act makes some groups of employees subject to these restraints automatically. But others are covered only if the Director of the Office of Government Ethics finds that they occupy a position involving "significant decision-making or supervisory responsibility," and so designates that position.
>
> Under the present language all uniformed officers at the grade of O-7 and above are automatically covered .... Yet the GS-17's and GS-18's are covered only if they occupy positions designated by the Director. 125 Cong. Rec. 7142-43 (April 4, 1979). (Emphasis added).

In discussing the proposed 1979 amendments to the ethics legislation of the previous Congress, Senator Ribicoff similarly expressed the distinction between the Executive Schedule individuals who are covered automatically, and the GS-17's and 18's who must be designated by the Director of OGE:

> First. The first point concerns the ability of the Office of Government Ethics to designate Federal employees as subject to subsection (c). Under the amendment, no Federal employee below GS-17 and no military personnel below grade O-7 could be subjected to the subsection (c) "no contact" provision by OGE--with the sole exception of the members of the Senior Executive Service. Inclusion of the SES allows OGE to designate officials as low as GS-16, since that is the lowest grade eligible for that Service. This new subparagraph does not, of course, affect Federal officials who are included automatically under the other subparagraphs of subsection (d), such as higher military grades and positions in levels I through V of the Executive Schedule. The objective of this House proposal is to eliminate the discretion of OGE to designate non-SES officials and employees below the GS-17 level. Our amendment concurs in that objective.
>
> Second. The second point also concerns the designation power of OGE. It would allow OGE to limit the scope, but not the substance, of subsection (c). This new language recognizes that former officials sometimes have little influence on a department outside their particular bureau or agency. Thus, in those cases, there is little or no potential for undue influence or unfair advantage over former colleagues or subordinates, who work in different, unrelated bureaus.
>
> * * *

> It should also be noted that some 9,000 Federal supergrade employees will be eligible for possible designations under this language, and that task could easily become impossible, if OGE had to distinguish between various offices, sections, and subdivisions of the various departments and agencies. Therefore, this designation provision is available only for the most significant agencies or bureaus within departments or agencies.
>
> In short, what this amendment means is that a former employee, who worked within a separate bureau in an agency, may be permitted to contact employees in a different bureau within the same agency--if the two bureaus involved have separate and distinct subject-matter jurisdiction, and if there is no potential for undue influence. The provision in subsection (e) continues to apply to those persons who are not designated under subparagraph (C) and instead are included under the automatic coverage of subparagraphs (A) and (B) of subsection (d). This new provision thus applies only to GS-17 and GS-18, military grades O-7 and O-8, and GS-16, 17, and 18 positions eligible for the SES. 125 Cong. Rec. 14820-21 (June 14, 1979). (Emphasis added).

It thus appears that there is support in the legislative history for an interpretation of the current statutory language of 18 U.S.C. § 207(d) that effectuates the apparent congressional intent that all persons compensated at a GS-17 and 18 (even though such compensation is "comparable" to that received by one at Level V of the Executive Schedule) must, to come within the restrictions of 18 U.S.C. § 207(c), be "designated" by the Director of the Office of Government Ethics under 18 U.S.C. § 207(d)(1)(C), rather than being covered "automatically" by § 207(d)(1)(A). It may be noted that the regulations promulgated by the Director of OGE and the Office of Personnel Management encompass such an interpretation. 5 C.F.R. § 737.25. The regulations promulgated by an executive agency charged with administering the provisions of a law, and the agency's interpretation of that law, while not necessarily binding on the courts, are given "considerable deference" and are generally followed unless there are "compelling indications" that such interpretation

is contrary to the legislative purpose. Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 105 S. Ct. 1102 (1985); Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981); E.I. du Pont de Nemours & Co v. Collins, 432 U.S. 46 (1977); C.B.S., Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

Jack Maskell
Legislative Attorney
American Law Division
June 19, 1987

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The Library of Congress

Washington, D.C. 20540

June 23, 1987

TO : Senate Governmental Affairs Committee
Oversight of Government Management Subcommittee
Attention: Charlene Simmons

FROM : Barbara L. Schwemle
Analyst in American National Government
Executive Branch Organization and Operations Section
Government Division

SUBJECT : Total Employment and Senior Employees in Selected Executive Branch Agencies

This memorandum and accompanying table are sent in response to your May 1 request for statistics on total employment and total number of senior employees in those Executive Branch agencies, departments, and compartments which you designated. The accompanying table presents, in complete form, data sent to you under separate cover on May 18, May 26, and June 9.

In your letter to Director Joseph Ross, you requested that CRS collect statistics on senior Federal employees as defined by 18 U.S.C. 207(d)(1). According to that definition, senior employees include those persons in General Schedule grades 17 and above, military pay grade 0-9 and above, and specially designated positions which are published in 5 CFR 737.33. Since the statutory language mentions rates of pay "comparable" to that received in the Executive Schedule [18 U.S.C. 207 (d)(1)], this memorandum also provides data on the total number of employees in those pay categories which are equal to a level V of the Executive Schedule. These statistics include those individuals in Executive Level I-V, General Schedule grades 17 and above, and Senior Executive

Service pay levels ES-4,5, and 6. Data on senior foreign service officers and chiefs of mission whose pay is comparable to a level V are also included for the State Department. Employment in the Federal Government is in constant flux, and all of the statistics in this memorandum should be regarded as best estimates of the current situation.

The senior employee positions in Title 5, section 737.33 of the Code of Federal Regulations are to be designated and listed annually by the Office of Government Ethics (OGE). The General Counsel's office at OGE reported to CRS during a telephone conversation that an agency's senior employee total could be obtained by counting the positions included under each agency, department, and compartment on the OGE list and adding that total to an agency's corresponding Executive Level I-V totals. (Those employees in military pay grade 0-9 would be added to the Department of Defense total as well).

A count of these specially designated positions, as published in the January 1, 1987 edition of the Code of Federal Regulations and without the Executive Level totals added in, appears in the accompanying data under the heading "senior employee" designations. OGE said that a new edition of the list is currently being prepared and will be released within the next month or so. These numbers of designated positions, however, might not be entirely reliable. According to OGE, senior employee positions are nominated for inclusion on the list by the agencies; a process which could permit an agency to exclude a senior position from the list if it so desired. Furthermore, since the list is published annually it does not appear to take into consideration the almost constant movement which occurs among personnel in the senior ranks.

Information transmitted in this memorandum was obtained in the following manner. Total employment statistics were obtained during telephone conversations with both the workforce information staff at the Office of Personnel Management (OPM) and the personnel department staff at the respective agencies. Data on the total number of senior employees were obtained during telephone conversations with the executive resources staff at the respective agencies, who examined their employment rosters to determine the number in each senior employee category. CRS obtained the information in this manner because OPM's data base compiles only aggregate totals for an agency or department and does not break that data down for the various compartments. All of the data are from 1987, but the specific months and days differ depending upon when an agency executed a count or a computer run. Finally, CRS counted the number of specially designated positions on the OGE list to determine an estimated number of these positions. Data for the Department of Defense was transmitted under separate cover on June 11, 1987.

I have included copies of the current pay schedules for the Executive Schedule, General Schedule, and Senior Executive Service for your further information. I trust this information will be helpful. If I can be of further assistance, please do not hesitate to call me on 287-7026.

Total Employment and Senior Employees in Selected Executive Branch Agencies

Agency	Total civilian employment	Executive levels I-V	Senior employee designation	ES 4,5,6	GS17+
EXECUTIVE OFFICE OF THE PRESIDENT	1,527	58	81[a]	68	10
Office of Management and Budget	531	3	41[b]	47	0
Council of Economic Advisers	38	3	0[c]	0	0
National Security Council	69	1	8[d]	0	10
United States Trade Representative	147	4	21[e]	20	0
Council for Environmental Quality	11	3	0[f]	0	0
Office of Science and Technology Policy	12	1	7[g]	1	0
Office of Administration	197	0	1[h]	0	0
White House Office and the Office of Policy Development	408	40	0[i]	0	0
Office of the Vice President	25	3	1[j]	0	0
DEPARTMENT OF AGRICULTURE	104,487	14	114	210	3
DEPARTMENT OF EDUCATION	4,507	12	33	35	0
DEPARTMENT OF ENERGY	16,528	18	132	304	2
Federal Energy Regulatory Commission	1,570	0	13	34	0
DEPARTMENT OF HEALTH AND HUMAN SERVICES	127,634	13	366	347	1
Food and Drug Administration	7,071	0	12	36	0
Health Care Financing Administration	4,004	1	28	16	1
Public Health Service	42,064	3	182	218	0
Social Security Administration	75,397	1	50	30	0
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT	12,130	9	71	73	1[k]
DEPARTMENT OF INTERIOR	68,476	14	205	186	4

Total Employment and Senior Employees in Selected Executive Branch Agencies--Continued

Agency	Total civilian employment	Executive levels I-V	Senior employee designation	ES 4,5,6	GS17+
DEPARTMENT OF JUSTICE	66,030	28	277	122	87
Antitrust Division	579	1	25[l]	0	0
Bureau of Prisons	12,202	0	25	15	0
Civil Rights Division	432	1	0	7	0
Community Relations Service	148	1	0	4	0
Criminal Division	702	1	0	22	0
Drug Enforcement Administration	5,120	2	11	0	0
Federal Bureau of Investigation	21,619	4	59	0	0
Foreign Claims Settlement Commission	11	3	1	0	0
Immigration and Naturalization Service	12,373	1	11	19	0
Land and Natural Resources Division	519	1	0	10	0
Office of Justice Programs	349	4	5	6	0
Office of the United States Attorney	5,778	0	89	15	0
Office of United States Marshall	2,817	0	4	5	0
Tax Division	659	1	0	19	0
United States Parole Commission	168	0	9	0	9
DEPARTMENT OF LABOR	17,539	11	56	104	3
Bureau of Labor Statistics	2,512	1	1	12	0
Employment and Training Administration	1,713	1	8	20	0
Employment Standards Administration	3,914	0	7	15	0
Labor-Management Services Administration	958	1	5	7	0
Mine Safety and Health Administration	2,759	0	8	0	0
Occupational Safety and Health Administration	2,172	0	6	0	0
DEPARTMENT OF STATE	25,325	21	194	85[m]	3
Foreign Service Grievance Board	6	0	0	0	0
International Joint Commission United States and Canada (American Section)	25	0	3	0	0[n]

Total Employment and Senior Employees in Selected Executive Branch Agencies--Continued

Agency	Total civilian employment	Executive levels I-V	Senior employee designation	ES 4,5,6	GS17+
DEPARTMENT OF THE TREASURY	146,186	13	72	290	0
Bureau of Alcohol, Tobacco and Firearms	2,940	0	4	4	0
Bureau of Engraving and Printing	2,291	0	5	2	0
Bureau of the Mint	2,055	0	4	3	0
Comptroller of the Currency	3,017	1	4	36	0
Internal Revenue Service	110,649	2	12	144	0
United States Customs Service	14,549	0	12	17	0
United States Secret Service	4,209	0	2	7	0
DEPARTMENT OF TRANSPORTATION	61,157	14	152	303	0
Federal Aviation Administration	46,724	1	38	127	0
Federal Highway Administration	3,515	1	20	55	0
Federal Railroad Administration	635	1	13	9	0
Maritime Administration	1,066	1	15	17	0
National Highway Traffic Safety Administration	670	1	9	23	0
Saint Lawrence Seaway Development Corporation	168	1	2	2	0
United States Coast Guard	5,632	0	22	5	0
Urban Mass Transportation Administration	482	1	8	10	0
ENVIRONMENTAL PROTECTION AGENCY	14,161	11	56	129	1
FEDERAL EMERGENCY MANAGEMENT AGENCY	2,465	5	26	29	0
United States Fire Administration	19	1	0	0	0
GENERAL SERVICES ADMINISTRATION	21,690	2	113	82	0
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION	22,259	3	48	376	4
NATIONAL CREDIT UNION ADMINISTRATION	677	3	13	10	0
Central Liquidity Facility	5	0	0	1	0
OFFICE OF PERSONNEL MANAGEMENT	6,021	2	62	29	1
Office of Government Ethics	24	1	0	1	0

Total Employment and Senior Employees in Selected Executive Branch Agencies--Continued

Agency	Total civilian employment	Executive levels I-V	Senior employee designation	ES 4,5,6	GS17+

a. EOP reported 62 designations.

b. EOP reported 37 designations.

c. EOP reported 1 senior employee designation.

d. EOP reported all 10 as designated.

e. EOP reported 22 designations.

f. EOP reported no designations.

g. EOP reported no designations.

h. 1 AD rate of Pay which EOP reported as designated.

i. EOP reported no designations.

j. EOP reported no designations.

k. 4 supergrade administrative law judges.

l. Designations figure of 25 is total for 5 Divisions.

m. 746 Senior Foreign Service and Career Chiefs of Mission.

n. 1 AD and 1 statutory rate of pay.

BLS:db